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ECONOMIC OBJECTIONS TO THE

St. Lawrence Waterway Project

PART I

THE St. Lawrence Waterway Treaty now under consideration in the United States Senate is of greatest importance to the people from the standpoint of the general economic welfare, and incidentally to the railroads from the standpoint of subsidized water competition; also to the electric utilities from the standpoint of competitive power development. In this article the author considers certain objections to the proposal as a navigation project, which he holds to be economically unsound.

BY HOWARD B. WILSON

THE question of ratification of the St. Lawrence Waterway Treaty raises clearly defined issues of the economic justification of the project from both the viewpoint of transportation and also electric power.

Many broad, general assertions have been made concerning alleged benefits that would accrue to American producers and to consumers of electricity if the project were to be completed. It will, therefore, be of some value to the public to subject these assertions to a critical examination.

The treaty contemplates the construction of a waterway with a minimum depth of 27 feet from Lake Ontario to Montreal, and also hydroelectric power plants at several points along the St. Lawrence river. The expense of the project is to be borne jointly by the United States and Canada. The official estimate of the total cost of the project is $543,000,000, of which the United States is to bear $272,000,000. Some of the work has already been accomplished,

so that the estimated expenditure of new funds by the United States is $258,000,000. The Dominion of Canada is to be credited with the outlay made upon the new Welland Canal (approximately $120,000,000) which has been completed.

THE first objection to be made to the project is that the estimated cost is much too low.

It is a matter of experience that such engineering projects invariably cost more than the original estimates. For instance the final construction costs of the Panama Canal and of the Muscle Shoals project ran 134 per cent above the estimates in each case. Both the Suez Canal and the New York Barge Canal cost large sums in excess of the original estimates.

That the St. Lawrence project would inevitably cost far more than $543,000,000 is very clear for the reason that this amount does not allow anything for expenditures that would have to be made in deepening Great Lakes harbors to 27 feet.[1] The present depth of these harbors is about 20 feet. Competent engineering advice declares that it would cost approximately $250,000,000 to thus deepen these harbors and provide suitable port facilities.

COMPLETION of the project would also lower the water level in Montreal harbor and it is estimated that it would cost over $4,000,000 to restore the existing depth there.

Without enumerating all the items of expense that are not included in the government's estimate, suffice it to say that persons who have given the matter detailed study place the total cost at close to one billion dollars. It should also be remembered that almost ten years will be required to complete the project, but that the official estimate of cost does not include anything for interest or administrative costs during construction. Again it is highly probable that the building or operation of this huge project will result in large damage claims for the taking or flooding of lands. Under express terms of the treaty, the St. Lawrence Commission is made liable for any damage to persons or property during construction.

FURTHERMORE, upon the matter of expense Article III of the treaty contains "a joker."

It is there provided that the St. Lawrence Commission shall be empowered to construct the works in the International Rapids section out of funds which the United States undertakes to furnish. Let us recall that the experience of the American government in furnishing funds to foreign governments has not been entirely a happy one when the collection time arrives. Even aside from collection, the Federal budget can scarcely be said to be in such condition as to warrant advancing funds to anyone outside of the United States.

Much of the argument in favor of the proposed waterway is based upon the contention that American grain farmers would receive an economy of 10 cents per bushel upon their wheat exports and that this saving would be added to the price of wheat at the farm.

[1] The treaty itself refers to an obligation on the part of the United States to provide works in the Great Lakes above Lake Erie.

The first fallacy in this contention is that those who so contend compute their freight rates upon a basis of several years ago and not upon present charges. During the last two seasons, grain rates from the head of the Great Lakes to British ports have been greatly reduced and the surplus of shipping facilities indicates that they will continue to be low. Thus during 1932 the grain rate from ports at the head of Lake Superior to British ports, via Montreal, was only 12.5 cents per bushel, including insurance and handling charges. During the season of 1933 this rate dropped as low as 8.5 cents. In the light of this fact it will require considerable ingenuity on the part of the proponents of the proposed waterway to convince anyone that a freight rate saving of 10 cents could be effected.

EVEN when computed upon transportation costs of several years ago, there is much reason to believe that any apparent economy to our wheat producers would not exceed four or five cents a bushel.

Independent studies made by the Food Research Institute of Stanford University and by the Brookings Institution concur in the statement that perhaps about a 4-cent reduction a bushel in the then existing freights could be achieved. However, this is really merely an ostensible saving.

WATER transportation costs must be figured not only upon the rate that the shipper pays, but should also include all the costs that must be borne by anyone.

Expenses for interest, maintenance, and operation of the proposed waterway would aggregate $40,000,000 per annum. Upon the basis of probable traffic, this figure would amount to 11 cents per bushel of wheat shipped through the waterway. This amount would have to be paid by the taxpayers of the two countries. To this figure must be added whatever the shipper would pay to the vessels carrying his wheat. It is also likely that marine insurance charges would be higher than at present because navigation for ocean vessels would, in parts of the St. Lawrence route, be more dangerous than for the Great Lakes boats.

PRESUMING, however, that grain could be shipped to Europe at a saving, it is naïve to say that American producers would receive such saving.

The price of wheat is a world price that is determined very largely in the Liverpool market. Normally the Chicago price bears a direct relationship to the Liverpool price, although, of course, unusual circumstances may

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temporarily cause the two prices to get out of line. This relationship was very well proved during the days of our Grain Stabilization Corporation when the government attempted to raise the Chicago wheat price through purchases, only to find that the Liverpool price is the controlling one.

Now presuming that because of cheaper transportation grain could be offered upon the Liverpool market either in greater volume or at a lower price, such event would tend to depress the price at Liverpool. This would be reflected in the Chicago price and that is the basis for fixing the price offered at the American farm. Consequently it follows that our farmers would not receive the presumed freight saving, but that a large part of it would go to European importers or consumers.

It is not transportation costs, but other factors, that cause prosperity or depression for agriculture. This is shown by the wide fluctuations in the average farm prices of wheat in the United States for the following years: [2]

1913	79.3	cents	per	bushel
1919	218.6	"	"	"
1926	123.8	"	"	"
1931	38.5	"	"	"

FURTHERMORE, Canadian grain farmers would, presuming for the sake of argument that some freight saving could be achieved by means of the proposed waterway, benefit far more than would American producers. Canada already exports from eight to ten times the quantity of grain that we sell abroad and the probability is that the time is not far distant when our wheat exports will be negligible. A few years ago we sold about 20 per cent of our wheat production in foreign markets, but owing to present special circumstances we are exporting only about 5 per cent. The following table indicates the trend during the past decade:

EXPORTS OF WHEAT AND FLOUR FROM THE UNITED STATES

	Wheat (bushels)	*Flour (barrels)*
1921–1925 average	159,000,000	15,000,000
1929	90,000,000	13,000,000
1930	87,000,000	13,000,000
1931	80,000,000	9,000,000
1932	54,000,000	5,000,000

ON the other hand, Canada has vast possibilities of increasing its wheat production [3] and it is difficult to understand why the United States should pay half the cost of a canal which, if the arguments of its proponents be sound, would profit the grain trade of Canada to a greater extent than it would that of the United States.

Great Britain has shown that she intends to use preferential tariffs as a means of fostering commerce with her dominions; hence the probability is that if any transportation economies could be achieved for American farmers through the St. Lawrence project they would be nullified by the British tariff upon grain from the United States. Also Britain favors Argentine wheat for the purpose of balancing trade and exchange rates with that country. The possibility of American wheat finding larger markets in Germany, France, or Italy is not good because all three of these nations have had substantial increases recently

[2] U. S. Dept. of Agriculture figures.

[3] Approximately 70 per cent of Canadian grain is now exported.

Hidden Cost of Inland Waterway Transportation

"WATER transportation costs must be figured not only upon the rate that the shipper pays, but should also include all the costs that must be borne by anyone. Expenses for interest, maintenance, and operation of the proposed waterway would aggregate $40,000,000 per annum. Upon the basis of probable traffic, this figure would amount to 11 cents per bushel of wheat shipped through the waterway."

in their own wheat production as the following statistics show:

	1931 *Bushels*	*1930* *Bushels*
Germany	156,000,000	139,000,000
France	270,000,000	228,000,000
Italy	248,000,000	210,000,000

STILL another consideration is that much of our wheat is winter wheat produced in territory which is tributary to ports upon the Gulf of Mexico. Also some considerable portion is shipped through Pacific coast ports. To provide an alleged cheaper route for Canadians via St. Lawrence river would operate to the detriment of our producers in the Southwest and Pacific sections. As a matter of fact during the last two decades, grain receipts at Montreal have shown a phenomenal increase at the same time that our Atlantic ports and New Orleans were suffering declines. The following statistics portray the story:

GRAIN RECEIPTS [4]
(Including flour and meal reduced to grain equivalent)

	1910 *Bushels*	*1932* *Bushels*
Montreal	44,000,000	127,000,000
New York	93,000,000	72,000,000
Boston	22,000,000	8,000,000
Philadelphia	28,000,000	12,000,000
Baltimore	32,000,000	7,000,000
New Orleans	16,000,000	12,000,000

It will be noticed that the aggregate decline in grain receipts at American ports during the years specified is almost an equal amount with the gain registered by Montreal. It would seem as though the St. Lawrence route with its present depth of 14 feet is already able to give a good account of itself.

Why, then, should American taxpayers be burdened with furnishing what will likely amount to half a billion dollars for construction costs, to say nothing of annual maintenance and operation?

[4] Figures of New York Produce Exchange.

THE truth is that the present waterway is highly efficient. Lakes vessels which carry grain to Montreal are much better adapted to that service than are ocean vessels. No time or expense is lost upon "trimming" cargoes when loading, as would be the case with ocean-going ships. Because of a special type of construction the Great Lakes freighter can carry more grain per foot of draft than can an ocean ship. More will be said of shipping matters later, but while discussing the grain trade suffice it to say that the only additional expense in export business is transshipment at Montreal to ocean vessels. Since at the present time the transfer costs are only about one cent a bushel they are far more than balanced by the greater economies of Lakes vessels upon other points.

Even the matter of transshipment has an advantage because large quantities of wheat are stored in Lakes ships during the winter when their route is closed. This service is generally included in the freight rate at the end of the navigation season. In this way elevator storage charges are avoided. On the other hand, ocean vessels could not afford to be thus tied up for almost six months of every year. As the wheat harvests of the Northwest are not ready for shipment until within a few weeks of the closing of navigation, this vessel storage over the winter is of considerable importance in exporting grain.

Much attention has been devoted to an anlysis of grain traffic in that it is estimated to constitute over 60 per cent of the total traffic of the proposed canal. Yet grain makes up only 5 per cent of the total commerce carried upon the Great Lakes. The maximum traffic ever transported upon the Lakes amounted to 100,000,000 tons. Of this iron ore comprised about 60,000,000 tons, while coal accounted for 30,000,000 tons. As neither of these commodities carried entered into our foreign commerce, it is evident that the proposed waterway would serve only a small fraction of Great Lakes traffic. The remaining 10,000,000 tons were made up of grain, flour, lumber, pig iron, limestone, and miscellaneous merchandise.

BUT the proponents of the project assert that the existence of a 27-foot waterway would cause a greatly enlarged commerce to spring into being.

This is the hackneyed argument of the speculative promoters of railroads in the last century. We are all familiar with the consequences of the premature building of some railroads in western sections of the United States. The expected traffic did not develop in the volume alleged, so that successive receiverships and reorganizations became necessary. Bad as this result was, let us remember that the investors who lost money thereby made their commitments voluntarily in the hope of profits. It is quite different, however, from the situation where a government, through the power of taxation, can compel those who are opposed to certain public works, because untimely, to squander their money upon them nevertheless.

Another difference also exists.

When the unfortunate railroad ventures referred to were made, this country was rapidly forging ahead in its economic development; today we

are combating a severe business depression. Furthermore it would seem as though the large commercial nations of the world cannot confidently look forward to great economic expansion in the near future. Moreover nationalism and tariff barriers, dislocated exchange rates, monetary and banking difficulties, and low-purchasing power are the order of the day.

WHAT reasonable basis is there, then, to believe that the mere existence of a deeper channel from Lake Ontario to Montreal will stimulate a huge growth of traffic upon the Great Lakes and St. Lawrence—say 30,000,000 tons per annum. The likelihood is that not more than one third of that tonnage including Canada's share would move.

Cotton, one of our greatest exports, would not use the waterway. Nor would tobacco, another large export. Concerning imports, silk would not be transported by way of the St. Lawrence because that route is distant from our centers of silk manufacturing. Our exports of coal, lumber, petroleum, and fruits would not use the waterway for the reason that they are produced in sections too remote from the Great Lakes to render such use profitable. Fabricated goods from territory close to the Great Lakes would not be transported by the waterway for several reasons. They must be marketed throughout the year, whereas the canal would be closed about six months of each year. Being of higher value than bulk cargoes, they can pay higher freight rates and therefore they demand speedy rail transport to the seaboard. Again, as will be explained below, it is doubtful whether regular line service could be established by large ocean liners to Lake ports. In estimating the probable volume of export traffic that would move upon the waterway, the Bureau of Foreign and Domestic Commerce has stated that less than half of our export trade would go by way of the waterway. This was a generous estimate.

WITH respect to imports, it is likely that in the absence of special protection to American producers cheap coal from England and Germany would be brought by ocean tramp steamships into the Great Lakes. Pulpwood from Norway and some iron ore from Sweden, together with some rubber and coffee from the tropics might be expected to come up the St. Lawrence.

Concerning coal, the government should hesitate long before taking any step that would aggravate the chronic distressed condition of our coal industry. If cheap British or German coal should displace in American markets any part of our domestic production, the waterway would prove a national detriment instead of advantage. The

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deeper waterway would also disrupt our Canadian markets for coal from Pennsylvania, Ohio, West Virginia, and Kentucky to the extent of 10,000,000 tons yearly. This business would be lost to the coal producers in the Maritime provinces of Canada because of their proximity to the waterway in contrast to the rail haul that American producers must make to get their coal to Lake Erie ports. Such a result would cause American railroads to lose the revenue from 200,000 carloads of coal per year.[5]

[5] Estimate of American Short Line Railroad Association.

BEFORE leaving the matter of our coal industry, it should be noted that if the claims of the proponents of the project with respect to water power are correct, a large loss of sales of coal to steam plants will ensue. It has been estimated that were the hydro possibilities of the project to be fully developed, 40,000,000 tons of coal would be displaced annually. Then again if traffic were diverted from Eastern Trunk Line railroads, the coal consumption of these roads would be diminished.

These are factors which should, of course, be taken into consideration.

THE concluding instalment of this article will appear in our next issue—out March 1st—in which the author will further discuss what he deems to be the uneconomic features of both the navigation and power phases of the project.

Curious Items about the Telephone

NINETY-TWO per cent of the world's telephones are within voice range of the United States.

* *

IN Oregon, 455 miles of telephone line have been built by the Civilian Conservation Corps.

* *

WHAT is said to be the oldest telephone pole in the country is still giving service in Craigville, Mass.

* *

NEW ROCHELLE (N. Y.) has the greatest number of residence telephones per 100 families, Evanston (Ill.) ranks second, Pasadena, third, and Mt. Vernon (N. Y.) fourth.

* *

INDIA has a population of 355,000,000 and only 57,000 telephones—one telephone to every 6,250 people. In the United States there are 948 telephones for every 6,000 inhabitants.

* *

SAN FRANCISCO had more telephones per population than any other American city in January, 1933, with 36.5 phones per 100 persons. Pasadena was next with 35 per cent, and Washington, D. C., third with 33.3 per cent.

The Robbing of Peter To Pay Nobody

The country banker explains certain Federal policies to a utility bondholder

By FREEMAN TILDEN

A good customer of ours, a man of modest means, came into the bank yesterday and asked me what he should do about a certain public utility bond, which he has owned for more than ten years. He bought it, I think, at 98; since that time it sold as high as 107; but now this bond is quoted at not much better than 40 cents on the dollar. The owner is naturally worried. He naturally doesn't want to take a 60 per cent loss, but on the other hand he knows that this bond is selling on a default basis, even though it has not yet defaulted its interest payment.

Now, I know this bond well. It was marketed to a great extent in my part of the country, though it represents a mortgage on an operating company three thousand miles away.

"I suppose," said my customer, "I was a durn chump to buy a bond on a property so far away that I don't know what's been going on."

"No," I told him, "you needn't scold yourself for that. That is not the trouble. There are two factors that have sapped the sale value out of this mortgage obligation of yours. One of them, nobody is responsible for.

"It just so happens that general business conditions in the territory where your utility operates have been about the worst in the whole country, owing to the particular distress of the only industries they have. Let's look this bond up in our book! Well, here it is!

"Last year they earned their fixed charges, but by a painfully small margin. Still, that wouldn't account for a default price like 40 cents on the dollar. No, siree; it couldn't—not in the present bond market; because if bad business conditions are entirely responsible, other similar bonds ought to be selling not much higher; whereas this one is sliding along right on its ear. Must be something else. Management? Good. Capital set-up? Not top-heavy, as far as I can see."

"WELL, there must be something," said my customer.

"I'll tell you what it is, Frank," I said. "This bond of yours has been hit by a brickbat from a new source. It is the victim of Uncle Samuel's feverish desire to do something for somebody, even if it kills everybody."

"I don't get what you mean."

"Well, to come down to parsnips, here's what has happened. The government of the United States is spending a whale of a lot of money to develop power in that section where you put your loan. If the plan goes through, there will be enough horsepower generated out there to supply twice as many people as there will be there, in all likelihood, in 1950. Now, Frank, the stock market, and the bond-market, are not gifted with Lord Bacon's intelligence. There are no Aristotles in Wall Street. But they can see an elephant when he walks into their front yard. This privately owned utility to which you have lent money is going to have some competition in the power business—"

"Well, competition—well—competition might not be so bad, might it?"

"No, not competition in the sense you mean. Not the kind you indulge in with your rival grocer across the street. But the kind of competition the government plans, when it goes in for business, is a little different. You see, it makes the rules of the game. If you, an individual, get on the government's 3-yard line, Uncle Sam might suddenly decide that that end of the field was yours, instead of his. You, as an individual, would be penalized for offside play—frequently, too, —because the referee and linesmen would belong to the old home team. Or, to drop this football symbol, you'd be paying taxes, and the government would not; and you'd have a lot of stockholders and creditors on your coat tails, and the government, which, as we have seen, can drive two budgets tandem, would have a bottomless sock."

"OH, I see what you mean now. But I guess you're making it worse than it really is, because I saw a piece in the paper the other day where one of the government officials said that wherever the government goes in for a power development, it is going to protect investors in public utility securities.

"Uh-huh. And did the gentleman say how the government was going to do it?"

"No, I don't just remember that the article said that."

"Now, Frank," said I to my customer, "let me tell you right now that I'm not questioning the good faith of the man that said the government was going to protect the investor in the private utilities. I haven't the least doubt he believes just that. I go further. I don't question for a minute that nine out of ten, and maybe ninety-nine out of a hundred, of the myriads of public men connected with the administration's efforts in all directions, are absolutely sincere in trying to be fair and just. But there are two things to be considered, when you read such a statement. The first is, that the man who made the statement has no final power of decision. Therefore, he is merely stating what he believes, or hopes, to be true. The second is, that where so many men are in official position, and all of them equipped with

vocal cords, you'll have to get used to hearing one man say one thing, and another man say just about the opposite. Let me read *you* something. Listening?"

"Yep. Go ahead!"

"HERE is a statement by the head of the Public Works Administration. This statement was made to the press in comment on an article that attacked the PWA for financing municipal power projects which competed with present public utility companies. Get this earful: 'The utilities have brought it on themselves. If they had been content to give good service at reasonable rates, there would have been no demand for municipal ownership. . . . You can view with alarm as much as you please, but these things all work out in the end.'

"Gosh!" said my visitor.

"You may well say 'Gosh.' I consider that a mild expletive. Let's just explore this statement a minute. In the first place it looks as though the state regulatory commissions were in for a bit of a headache. If it is true that the operating utilities have not been giving good service at reasonable rates, the first and foremost quarrel should be with those who have the power to force utility companies to give that very thing. Either the regulatory commissions have that power or they have not. If they have the power, either they have employed it in the public interest, or they have not. Now, assuming that in the delicate adjudication of differences of opinion between the customer and the dealer in utility service there have probably been injustices done on both sides, it is certainly news to me that there has been any wholesale default in duty on the part of the commissions. Certainly, in recent years, I haven't heard any utility companies lamenting that they were not sufficiently and strictly regulated.

"BUT if this be the attitude toward utilities in general, the worst experience of the regulatory commissions would seem yet to come. If the purpose of the government is to finance and encourage competitive municipal plants, in many, if not most cases, this is in fact to duplicate facilities. Now, when town merchants duplicate supply facilities to the point where there isn't enough business to go around, the first thing that happens, in the race to survive, is either open price cutting, or hidden favors; and the next thing that happens is that some merchants go broke. One of the primary purposes of the recovery efforts of the administration is to prevent this very waste. If two privately owned utility companies were competing in the same territory, with

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identical services, it would be the business of the regulatory commission to prevent a rate war, or a service war, or the giving of special favors which, momentarily a delight to the consumer, would certainly not be to the ultimate advantage of anybody. But what of a government-owned central plant, feeding contracted service out through municipal plants in which the government also has a financial interest? Does any state commission seriously suppose that it can maintain control in such a case? If it does so seriously suppose, it is due for an awakening. The power to tax is the power to destroy, said some wise judge. I'd like to add: that the power to tax *some*, and *not others*, is dynamite.

"FROM the investor's point of view —that is, from the small capitalist's point of view, for he is the Great Investor, through the banks and the insurance companies, and his own holdings of mortgage obligations and equities—the worst thing about this is, that nobody knows where we are going. If it were a published fact tomorrow morning that the government had decided to go into the business, as sole owner, of supplying light and power and all other utility services, the country over, lock, stock, and barrel, personally I'd feel a sense of relief. The suspense would be over, anyhow. I have never fancied government in business, as manufacturer or distributor, but whenever it is the desire of the majority of the people to set up a corporate state, or any other kind of state, you won't find me whimpering and pulling back. I take it for granted that no honest government would wish to cheat the wholly innocent bystanders who have locked up their savings in the bonds and stocks of the existing companies. I take it for granted that there would be no desire to begin government ownership with confiscation or fraud.

"HERE is a power plant down the river a few miles from our bank. If the Federal government wants to take it over and run it, or if it wishes to supply the necessary funds for the municipality, or county, to take it over, all right. Those of us who own stock or bonds representing these assets and obligations, will more or less cheerfully accept government securities in exchange, particularly if we have the assurance that the government will not dilute its own capital assets. But if the purpose is, to build another plant, in the face of the plain fact that another plant is not needed, then one of those plants must close up, or both must operate on an uneconomic basis. If the present plant is the one that will close up, then there are some engraved certificates, at present fondly believed to have value, which can be used to paper the woodshed. Unless, of course, the same administrative hand that closed the plant, is willing to open its purse. In any case, so far as I can see, the regulatory commissions, now responsible for rates and services, could pull down the shades and go home. Their services would not only no longer be needed—but the offer of them would be an impertinence."

THINKING of these things, I began to wonder how the employees of the public utility companies view the prospective competition. Off hand,

Must the Property of the Thrifty Be Taken from Them?

"MUST we face the fact, if it be a fact, that the saving man, the thrifty man, the man who has tried to provide for the helpless and the immature, the man who has tried to provide against his own old age or disability, is to be mulcted for the supposed benefit of the needy? Must he? I don't know. . . . If we are to be despoiled, we should like to be sure, at least, that somebody is really benefited. In the present procedure this is not at all certain."

one might say that the duplication of plants and services would supply new jobs, not only in creation, but in maintenance. Or, if the government should decide to take over the existing plants (which would be far better economy, even if worse politics), the employees might conclude that it would be just as nice to work for the government, or the city, as for their present employers. But would it? And would they find themselves working for *anybody?* If there is any way under the broad sky, to keep government enterprises from being infested with political jobholders, that way has never yet been discovered, so far as I know. I think, right at this moment, at the *very top* of our government in Washington, there is a finer conception in this respect, a desire to ignore political affiliation and look only to merit—than has been the case in my memory. But, shucks,—let's be realistic about it! The men at the top have only two eyes, two ears, and twenty-four hours a day. You can't kill the professional spoilsman with fumigation. You only drive him into a crack in the wall. The minute your back is turned, he is in business at the old stand. Witness, my dear friends, what has happened in the "wet" states, the minute the lid came off the prohibition pot, and licensing of sellers of liquid refreshments was in order! And in spite of the firm determination of our chief administrators that there should be no bad smell!

BUT neither the approaching plight of the state commissions, nor the fortunes of the employees of present utilities, interests me as much as the fate of the investors—because after all, that's my fiduciary business. We have seen, in the past three years, a horde of bondholders' committees set up, in the case of default or suspension of services on government, municipal, corporate, and other obligations. It makes sad reading. You, bondholders, are asked to deposit your bonds with some august committee, who will try to wangle something out of the débris. The horse has skipped out of the barn—let's put a padlock on the door!

I'M beginning to wonder whether the time to form bondholders' com-

mittees isn't before the animal jumps out. The time to form bondholders' committees in respect of a good many issues of public utility bonds may be right now. Would it do any good? I don't know. But at any rate, if you get to the station too early, though you have to cool your heels and wait for the train to start, at least you don't have the foolish sensation of having the gate slammed in you face. Would it do any good for the bondholders whose capital is in danger of being wiped out, to band together to see whether public sentiment can be aroused against indecent spoliation? Or must we face the fact, if it be a fact, that the saving man, the thrifty man, the man who has tried to provide for the helpless and the immature, the man who has tried to provide against his own old age or disability, is to be mulcted for the supposed benefit of the needy? Must he? I don't know. I happen frankly to be one of the thrifty ones; more than that, I happen to be a steward of the money of many other thrifty ones. If we are to be despoiled, we should like to be sure, at least, that somebody is really benefited. In the present procedure this is not at all certain. To rob Peter to pay Paul may be, though immoral, at least a lesser evil; but to rob Peter to pay Nobody—that, indeed, is a sour prospect.

And since there is so much obvious freedom in the planning to dispose of the Forgotten Man's[1] money, I'd just like to quote something written in the late-middle part of the last century, by John Ruskin. And here, despite his extreme liberalism, is what he said:

> "The first necessity of all economical government is to secure the unquestioned and unquestionable working of the great law of Property—that a man who works for a thing shall be allowed to get it, keep it, and consume it in peace; and that he who does not eat his cake today, shall be seen, without grudging, to have his cake tomorrow. This, I say, is the first point to be secured by social law; without this, no political advance, nay, no political existence, is in any sort possible."

Ruskin, mind you, was regarded with horror by the capitalists of his time. He was accused of being an anarchist, a communist, and everything dangerously progressive.

[1] The Forgotten Man I refer to is the man described by William Graham Sumner in his book "What Social Classes Owe to Each Other." This Forgotten Man, it would seem, is being Forgotten more completely than ever!

According to Circumstances

A spirited critic has said that public utility men are in a way like trustees, so that to speak or remain silent may equally be a breach of duty "according to circumstances."

* *

That puts public utility men in a somewhat precarious position.

* *

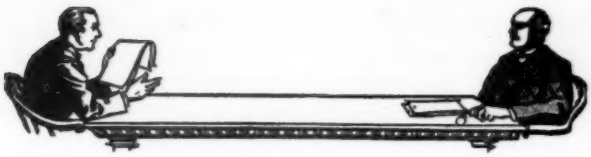
It is that *"according to the circumstances"* which makes it hard for the utility man, even with the best of intentions.

* *

If the rule were that utility men, like children, should always be seen and not heard, it would be very easy for them to know what is expected of them.

* *

But to make it the duty of utility men to speak or keep silent "according to the circumstances," is quite some proposal.



Are the NRA Codes Valid as Regulations of State Commerce?

A Nice Question of Constitutional Law

THE evident theory of the Recovery Administration is said by the author to be that all commercial activities affect interstate commerce, and that the grant of the power to the President to include in codes approved or prescribed by him whatever he deems necessary to effectuate the policy of Congress to rehabilitate industry, justifies the promulgation of codes providing uniform regulations for all business, both state and interstate, and that codes were intended for such uniform application. Will that theory be upheld by the Supreme Court?

BY JOHN E. BENTON

GENERAL SOLICITOR, NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS.

ON December 2, 1933, the case of Purvis et al. *v.* Bazemore was decided in the United States District Court for the Southern District of Florida.

The defendant was the operator of a local cleaning and dyeing establishment. The plaintiffs, competitors in business, asked the court to enjoin him from violating the code of fair competition of the cleaning and dyeing trade through failure to observe the minimum prices fixed by the code.

The court refused the injunction upon the ground that if the National Industrial Recovery Act was intended to cover the defendant's business it was beyond the power of Congress to enact, because that business was intrastate, and not subject to the regulation of the Federal government.

The National Recovery Administration promptly issued a press release, in which Mr. Richberg, the very able counsel for the administration, commenting upon the decision, said:

> "It is evident that neither the facts nor the law were adequately presented to the court in this preliminary hearing in a litigation between two private parties. The court evidently had no information of the extent to which there is interstate commerce in cleaning and dyeing and the extent to which the local operation of cleaning and dyeing establishments may affect interstate commerce. Furthermore, the court had before it quite evidently only a few of the facts underlying the passage of the Recovery Act, or the facts concerning the administration of the act. . . . The power of the Federal government to regulate local business for the protection of interstate commerce has been sustained repeatedly by the Supreme Court of the United States, which is the supreme authority on this subject and an authority which every other Federal court must follow."

THIS Florida case presents in very striking form an example of the extent to which the control of com-

merce by the Federal government is claimed to have been carried. The NRA codes make no distinction between interstate and intrastate activities. Apparently all business is claimed to be subject to code regulation under the National Industrial Recovery Act, commonly called the Recovery Act. This claim has induced the following brief consideration of the legal basis for these codes.

UNDER the provisions of the statute, codes of fair competition have been approved covering the major industries of the country. Scores of other codes covering minor industries have been prepared and filed with the National Recovery Administration, and are in course of consideration or hearing preliminary to approval. It is said to be the intention of the administration to bring all branches of industry in the United States, not covered by Emergency Railroad Transportation Act, 1933, or by the Agricultural Adjustment Act, under codes approved or prescribed under the Recovery Act.

Until now these codes have been drawn by associations or groups within the respective industries to which they apply. As provided in the act, they have been subjected, before approval, to public hearings, and to such amendments as the President has deemed necessary.

HEARINGS, however, have been abbreviated. There was, indeed, no alternative, if codes were to be quickly settled, and approved, so that their effect might be felt as an aid towards recovery from the existing depression. Nevertheless, such hearings come far from being the character of hearings to which the American people are accustomed, when public hearings are provided for.

THE prime purpose of the Recovery Act is generally understood to have been an increased employment of labor, and the aid of business by opening the door to a relaxation of the Sherman Act, permitting, with governmental sanction, agreements as to production and prices. The codes, however, deal with all sorts of matters.

The compulsory provisions required by § 7, declaring the right of employees to organize and bargain collectively, and those which prohibit employers from imposing so-called "yellow dog" contracts upon employees, and requiring employers to comply with minimum hours of labor and minimum rates of pay and other conditions of employment approved or prescribed by the President, are, of course, in every code. Other general labor provisions are those forbidding the employment of children below certain specified ages.

Turning from labor provisions, however, the regulations are heterogeneous.

The petroleum products, the lumber, and other codes, forbid the sale of products below published price lists, or the promotion of sales by the giving of rebates, premiums, or other concessions. The lumber code provides the length of free credit allowable to purchasers before interest shall begin to run on bills due, and specifies the commissions which may be paid to commission men. The automobile sales code regulates the trade-in value at which used cars may be purchased,

and the corset and brassiere industry code forbids the purchase of materials to be used in manufacture "which have not been made in a clean and sanitary factory." The coal code forbids the unauthorized use by one producer of the slogan or advertising matter of a competitor, and also the attempt "to obtain information concerning a competitor's business by gifts or bribes." The code of the cleaning and dyeing industry stipulates the minimum prices which may be charged for cleaning and pressing garments. The code of the motor bus industry forbids deviation from tariff rates to be filed by operators with the code authority.

These examples suffice to show the miscellaneous character of regulations which the codes seek to impose, violations of which the Recovery Act provides may be enjoined or punished criminally.

THESE codes, if they may be enforced, depend for their validity upon the Act of Congress, and upon their promulgation by the President. The proposals from associations and groups, requesting their promulgation, and the evidence presented at code hearings, stand alike. They are for the information of the President only. The code when promulgated is his act. He is free to include in it such provisions as he deems are necessary to effectuate the policy of the act.

When promulgated, every code purports to be a Federal regulation authorized by Act of Congress, and promulgated by the President under a delegation of authority in such act to him. If the codes are valid, they have the effect of statutes, just like rates established by the Interstate Commerce Commission under the Interstate Commerce Act.

Various objections to the validity of the codes are made. It is said that they cannot be enforced against objectors consistently with the due process clause of the Constitution.

The right of the individual to determine the wages which he will pay to those whom he employs, or the price at which he will sell the commodities he produces, or the terms upon which he will agree to labor, has been held to be a constitutional right. This question of due process will not be argued here. It will merely be pointed out that the court has repeatedly held that liberty to fix the terms of contract between employer and employee is a constitutional right which may not be infringed by state or Federal legislation.[1]

It is not easy to see how the code provisions fixing minimum wages, and barring "yellow dog" contracts can be sustained without flatly overruling these and other decisions of the court. Since those decisions were

¶ "WHEN *promulgated, every code purports to be a Federal regulation authorized by Act of Congress, and promulgated by the President under a delegation of authority in such act to him. If the codes are valid, they have the effect of statutes, just like rates established by the Interstate Commerce Commission under the Interstate Commerce Act.*"

rendered, however, perhaps there has been a change as to what is held by "strong and preponderant opinion to be greatly and immediately necessary to the public welfare," to use a phrase from the opinion of Mr. Justice Holmes [2] and this may have its effect upon the judgment of the court.

It should also be kept in mind that the Congress has declared in effect that the legislation is enacted to meet a national emergency, found by the Congress to exist, and that the industrial recovery section of the act, which we are now considering, is for the limited period of two years. It is conceivable that the court may extend to cases arising under this legislation, during the present emergency, the doctrine of the rent cases [3] in which an emergency was held to justify the exercise of Federal control over rental contracts, although such interference could not be justified in normal times.[4]

Another question, the answer to which is necessary to a determination of the validity of the NRA codes, is whether the power to promulgate these codes is a power which Congress could delegate.

It is an elementary rule that legislative power cannot be delegated. Past decisions, however, have established that Congress may declare a general rule, and delegate to some official or board power to determine what falls within that general rule.[5]

In the Federal Trade Commission Act Congress declared "unfair methods of competition" unlawful, and left it to the Federal Trade Commission to determine whether a particular practice falls within the denunciation of the statute.[6]

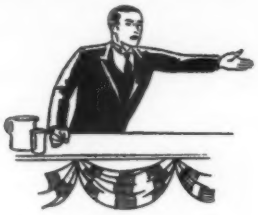
The purpose of those who drew the Recovery Act doubtless was to bring it within the doctrine of these cases. Codes to be promulgated are in the act denominated "codes of fair competition," and their provisions are made "standards of fair competition." However, the term "unfair method of competition," as used in the Federal Trade Commission Act, has a rather restricted application. They do not apply unless the practice complained of is both injurious to the public and to competitors.[7]

It is, accordingly, plain that the Recovery Act intends that the codes established thereunder shall proscribe acts which could not have fallen within the description "unfair methods of competition" as that term was used in the Federal Trade Commission Act. Provisions as to labor, required to be included in every code, have already been mentioned; and the President is given unfettered discretion to impose others.

The declaration of policy, as we have seen, specifies the elimination of "unfair competitive practices" as but one of many objectives, all of which are designed "to rehabilitate industry and to conserve natural resources."

It would be difficult to indicate a broader field.

The President is empowered "in his discretion" to prescribe any regulations which he deems necessary to effectuate the policy of Congress so set forth. If in such general language he can be enabled, in his discretion, and without other description of the character of regulations he is to im-



Constitutional Liberty to Fix Terms of a Contract

"THE right of the individual to determine the wages which he will pay to those whom he employs, or the price at which he will sell the commodities he produces, or the terms upon which he will agree to labor, has been held to be a constitutional right. . . . The court has repeatedly held that liberty to fix the terms of contract between employer and employee is a constitutional right which may not be infringed by state or Federal legislation."

pose, to make such regulations for the government of the various industries of the United States as he deems wise, it would not seem that much would be left of the supposed constitutional rule that legislative power cannot be delegated.

IT must, however, be acknowledged that this rule has already shown great elasticity in the class of cases which have been referred to. Furthermore, it must also be admitted that it would have been impossible for Congress to provide regulations of the character of those attempted in the codes for all branches of industry by direct legislation. If they were to be provided it was necessary to delegate the power to frame and promulgate them to some official or agency. Perhaps if Congress exercises implied emergency powers, the same right to their exercise may be found to have application to this question.

The length to which this doctrine of emergency may reach is difficult of appraisement. It rests on no express language of the Constitution.

If the power exists it is an implied power which rests upon the theory that the Constitution was established to continue through the ages, in the course of which emergencies of unlooked-for character were certain to arise, and that it must have been the intent of the Constitution that the Congress should have power to meet such emergencies by taking such steps as might be necessary to perpetuate the government.

IF Congress has this power, when an emergency arises, it must be the judge of the means necessary to be used, and it is not easy to perceive the basis upon which its judgment can be subjected to judicial con-

trol, and any of the constitutional safeguards preserved. This is what Mr. Justice Davis evidently had in mind when expressing the judgment of the United States Supreme Court in an early case in which he said:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence." [8]

If it be assumed that these codes have been lawfully promulgated, and that their provisions, in so far as they apply to business subject to the control of the Federal government, are not violative of constitutional rights, to what business operations do they apply? In other words, do they apply to interstate commerce activities only, or to all business, both interstate and intrastate?

It is to be noted that to be an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, under the provisions of paragraph (b) of § 3 of the Recovery Act, or to be punishable by fine under paragraph (f) of said section, a violation of a code must be in a "transaction in or affecting interstate or foreign commerce." It would seem that the Congress understood that its power to regulate industry must rest upon its jurisdiction over interstate and foreign commerce, and that it had no intention of attempting to regulate intrastate commerce as such, even though it did see fit, perhaps as a precautionary measure, to buttress its legislation by a finding of emergency.

THE evident theory of the Recovery Administration, however, is that all commerce activities affect interstate commerce, and that the grant of power to the President, to include in codes approved or prescribed by him whatever he deems necessary to effectuate the policy of Congress to rehabilitate industry, justifies the promulgation of codes providing uniform regulations for all business, both interstate and intrastate, and that codes promulgated were intended for such uniform application.

It has always been recognized that the power to regulate their internal commerce is a reserved power of the several states.[9] This power of the states, however, is not unlimited. Like other reserved powers, it must yield to the Federal power when such yielding is necessary to enable the Federal government to execute the powers delegated to it. This principle was declared by Mr. Justice Hughes in the Minnesota Rate Cases.[10] Later, in the Shreveport Case,[11] and in other cases, the court held that, to the extent necessary to enable Congress effectively to regulate interstate commerce, state regulations must give way; and, later, in the Packing House Cases [12] the court sustained the exercise by Congress of the power to regulate local intrastate acts of dealers and commission men which were incidents of interstate commerce, or affected the stream of interstate commerce.

IT is upon this line of cases that those who assert the effectiveness of

the NRA codes to control local business principally depend. It is not the first time that the attempt has been made to use the power of the Federal government to regulate interstate commerce for the purpose of exerting control over matters normally subject to the police power of the states.

In a comparatively recent case the Supreme Court dealt with a statute whereby Congress sought to bring to an end child labor in industrial establishments.[13] The act made it unlawful to ship in interstate commerce goods produced in a factory in which, within thirty days prior to the removal of such goods, child labor was employed.

THE court held that this was an attempt to control the exercise of the police power of the states, and that it transcended the constitutional power of Congress. In its opinion the court said:

> "It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

After this decision Congress undertook to end child labor by imposing a tax upon the products of factories employing the same. In an opinion holding the law unconstitutional,[14] Chief Justice Taft said:

> "The law is attacked on the ground that it is a regulation of the employment of child labor in the states,—an exclusively state function under the Federal Constitution and within the reservations of the Tenth Amendment. . . .
>
> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good.

IT will be observed that the NRA codes attempt to effect the very reform which the court, in the cases just cited, explicitly held Congress could not compel through the exercise of its power to regulate commerce or through the taxing power. Furthermore, it would seem that the principle of these cases applies not only to the matter of child labor, but to every other regulation sought to be imposed upon local production or local business of any kind. Under the NRA codes that universality of control over all business by the Federal government is sought to be accomplished which in Hammer *v.* Dagenhart the court said could not be exercised by Federal authority without the practical destruc-

¶ "THE *length to which this doctrine of emergency may reach is difficult of appraisement. It rests on no express language of the Constitution. If the power exists it is an implied power which rests upon the theory that the Constitution was established to continue through the ages, in the course of which emergencies of unlooked-for character were certain to arise.*"

tion of our system of government.

Those who assert the validity of the codes, however, as respects intrastate business, contend that local business and the conditions under which it is carried on affect interstate business, and that the measures undertaken by the Recovery Act for the rehabilitation of interstate business cannot be made effective unless they are applied as to intrastate business as well.

THEY point out that the Federal power to regulate interstate commerce goes much beyond mere commercial regulations governing the exchange of commodities; and that Congress, in the words of the court, may "enact 'all appropriate legislation' for its 'protection and advancement' . . . 'to foster, protect, control, and restrain.'" [15] As Congress has power to take measures under the Commerce Clause to foster interstate commerce, the measures contemplated and provided for in the Recovery Act are claimed to be within the discretion and power of Congress as declared by the court. They point to the historic utterances of Mr. Justice Story:

> "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interests should require." [16]

They also point to the following language of Chief Justice Marshall which has become the classical description of the breadth of granted powers:

> "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." [17]

SEVERAL cases involving NRA codes have been decided by the lower Federal courts, and with only one or two exceptions the code provisions involved have been sustained.[18] Some of the opinions are very brief. The most carefully prepared of all is that of Mr. Justice Adkins in Victor *v.* Ickes. In a very full and able opinion he reviews the authorities and bases his decision squarely upon the Commerce Clause. The claim that the Recovery Act is justified by the emergency, finding of which is contained in § 1, is waved aside, as unnecessary to be considered.

This case of Victor *v.* Ickes arose under the petroleum products code. The plaintiffs, operators of filling stations for the retail sale of petroleum products in Detroit, sought to enjoin the defendant from prosecuting them for violating the code through the giving of trading stamps to promote sales. There was evidence that the

Attitude of Courts toward Changes in Function of Government

"NEVER in the course of history has a court in a single decision worked such a revolution as would be accomplished by holding that Congress, merely by declaring the existence of an emergency, may subject all of the activities of all forms of business to whatever regulations the President may see fit to impose for the purpose of promoting the rehabilitation of industry."

giving of premiums with retail sales in the past in Detroit had operated to promote gas wars and price cutting, had caused failure of retail distributors and the diversion of purchases of distributors to cheap foreign markets, causing serious diminution of the movement of gasoline in interstate commerce. Upon this and other evidence the court found "That the practice of giving premiums with the sale of gasoline in intrastate commerce in Detroit has imposed a direct burden upon interstate commerce and the necessary effect of such a practice is to substantially and unduly obstruct the interstate commerce between Michigan and other states in gasoline and substantially to reduce the amount of such interstate commerce."

UPON this finding the code provision involved was sustained as a valid exercise of a well-established power of Congress to remove a condition hurtful to interstate commerce.

In Wallace *v.* Calistan Packers, the Secretary of Agriculture sought an injunction to restrain the defendant from producing canned peaches in excess of the amount permitted by regulations promulgated under the Agricultural Adjustment Act. Granting the injunction, the court said:

> "The power to regulate interstate commerce is granted in broad terms to the National Congress and this power should not be restrictively construed. Rather it must be construed to give the Congress the power to regulate any and all commerce which may seriously affect the interstate trade. . . .
>
> "The Congress has made a legislative finding that a national emergency exists. This court, upon that finding and upon its own judicial notice of the economic distress throughout the Nation, here arrives at a similar conclusion. . . .
>
> "To adopt the view that the Constitution is static and that it does not permit Congress from time to time to take such steps as may reasonably be deemed appropriate to the economic preservation of the country, is to insist that the Constitution was created containing the seeds of its own destruction. This court will not subscribe to such a view."

IT will be noted that in this case the emphasis is placed principally upon the existence of an emergency. This is true also of the opinion in the Southport Petroleum Company Case, in which Mr. Justice Cox said:

> "Congress has declared the existence of a great national emergency, and has given the President great powers to meet that emergency. The rationale of the doctrine of self-protection is that the necessity for

it is inherent in the nature of every organism. Necessity confers many rights and privileges, which otherwise would not exist.

. . .

"Here we are facing a national emergency declared to exist by the legislative department, which has invested the President with power and authority to meet it. Every presumption is in favor of the validity of the authority so granted to the President."

This language just quoted shows the danger attendant upon an acceptance of the emergency doctrine.

If there is an implied power under the Constitution to disregard its commonly recognized guaranties in a time of emergency, and if "every presumption in favor of the validity" of the extraordinary power sought to be exercised is to be entertained, it would seem that in a time of national stress, when legislatures are tempted to extreme measures, when passions are aroused, and when private rights and personal liberties are most likely to be disregarded,—at the very time, in short, when the protection of constitutional guaranties is most needed, they are withdrawn. As against an emergency power of this character, there are no constitutional guaranties and no reserved power of the states.[19]

THE length to which acceptance of this emergency theory, as now advanced, would carry us, we must believe will compel its rejection. It would constitute destruction of our system of government, with powers divided between the Nation and the states.

In the Child Labor Tax Case, which has been referred to, when Congress was endeavoring to impose a single regulation upon local business, through the imposition of a tax on profits in which child labor was employed, the court said:

"Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

Nobody who is a student of judicial decisions will care to say where the court will draw the line in passing upon the validity of these NRA codes. The United States Supreme Court speaks the last word. It is not compelled to concern itself greatly about the absolute consistency of its opinions; and it may sometimes seem that this is one of the least of its concerns.

THE cases which will come before the court under the Recovery Act, the Agricultural Adjustment Act, and the Emergency Railroad Transportation Act, 1933, may well present occasion for some extension of accepted principles of law, or for some modification or possible change of the same.

On the other hand, courts do not work sudden revolutions. They are conservative. Through a long series of opinions, first announcing a principle, and then extending the application of it step by step, the courts may in the course of time work a substantial change in the functions of government; but never in the course of history has a court in a single decision worked such a revolution as would be accomplished by holding that Congress, merely by declaring the existence of an emer-

gency, may subject all of the activities of all forms of business to whatever regulations the President may see fit to impose for the purpose of promoting the rehabilitation of industry in the country.

Citations

[1] Adair *v.* United States (1908) 208 U. S. 161, 52 L. ed. 436; Coppage *v.* Kansas (1915) 236 U. S. 1, 59 L. ed. 441; Wolff Packing Co. *v.* Court of Industrial Relations, 262 U. S. 522, P.U.R.1923D, 746; Adkins *v.* Children's Hospital (1923) 261 U. S. 525, 67 L. ed. 785.

[2] Noble State Bank *v.* Haskell (1911) 219 U. S. 104, 55 L. ed. 112.

[3] Block *v.* Hirsh (1921) 256 U. S. 135, 65 L. ed. 865; Brown Holding Co. *v.* Feldman (1921) 256 U. S. 170, 65 L. ed. 877.

[4] Chastleton Corp. *v.* Sinclair (1924) 264 U. S. 543, 68 L. ed. 841.

[5] United States *v.* Grimaud (1911) 220 U. S. 506, 55 L. ed. 563.

[6] Federal Trade Commission *v.* Gratz (1920) 253 U. S. 421, 64 L. ed. 993; Federal Trade Commission *v.* Beech-Nut Packing Co. (1922) 257 U. S. 441, 66 L. ed. 307.

[7] Federal Trade Commission *v.* Klesner (1929) 280 U. S. 19, 74 L. ed. 138; Federal Trade Commission *v.* Raladam Co. (1931) 283 U. S. 643, 75 L. ed. 1324.

[8] *Ex parte* Milligan (1866) 4 Wall. 2, 120.

[9] Gibbons *v.* Ogden (1824) 9 Wheat. 1.

[10] (1913) 230 U. S. 352, 431, 57 L. ed. 1511.

[11] (1914) 234 U. S. 342, 58 L. ed. 1341.

[12] Swift & Co. *v.* United States (1905) 196 U. S. 375, 49 L. ed. 518; and Stafford *v.* Wallace (1922) 258 U. S. 495, 66 L. ed. 735.

[13] Hammer *v.* Dagenhart (1918) 247 U. S. 251, 62 L. ed. 1101.

[14] The Child Labor Tax Case (1922) 259 U. S. 20, 66 L. ed. 817.

[15] The Shreveport Case, (1914) 234 U. S. 342, 58 L. ed. 1341.

[16] Martin *v.* Hunter's Lessee (1816) 1 Wheat. 304, 326.

[17] McCulloch *v.* Maryland (1819) 4 Wheat. 316, 421.

[18] This was true in Economy Dairy Co. *v.* Wallace, a case arising under the Agricultural Adjustment Act, decided by Justice O'Donoghue in the District of Columbia Supreme Court; in Southport Petroleum Co. *v.* Ickes, decided in the same court by Justice Cox; in Victor *v.* Ickes, in the same court by Justice Adkins, and in Wallace *v.* Calistan Packers, in the United States District Court for the Northern District of California.

[19] This article was in type before the opinion of the United States Supreme Court in Home Building and Loan Association *v.* Blaisdell et al., decided January 8, 1934, upholding the Minnesota mortgage moratorium law, was handed down. The following language from the majority opinion in that case, however, is significant:

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal government and its limitations of the power of the states were determined in the light of emergency and they are not altered by emergency. . . . Thus, the war power of the Federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme coöperative effort to preserve the Nation. But even the war power does not remove constitutional limitations safeguarding essential liberties."

"THERE are nearly $19,000,000,000 of railroad securities in the hands of the public. This is almost as much as the entire national debt of the United States. It means that railroads pay $850,000,000 in interest yearly. This vast sum represents a vital part of our national income."

—ROGER W. BABSON.

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

HUGH S. JOHNSON
National Recovery Administrator.

"Perfection is beyond human capacity to achieve."

JAMES M. BECK
U. S. Representative, Pennsylvania.

"The vital spirit of the American Constitution has been snuffed out."

GENERAL W. W. ATTERBURY
President, Pennsylvania Railroad.

"I have felt and still feel that this is no time for the assertion of political partisanship."

ARTHUR E. MORGAN
Chairman, Tennessee Valley Authority.

"Water power in the future may have very stiff competition from both steam and Diesel engines."

HENRY H. WALLACE
Secretary of Agriculture.

"If the New Deal means anything, it means the subordination of capital rights and property rights to human rights."

CARL D. THOMPSON
Secretary, Public Ownership League of America.

"Public ownership of basic public utilities is the only method by which we can develop a stabilized social and industrial order."

S. WELLS UTLEY
President, Detroit Steel Casting Company.

"You cannot have a controlled society or a controlled industry up to a certain point, and a free society or free industry beyond that point."

E. B. ROBERTS
Westinghouse Electric & Manufacturing Company.

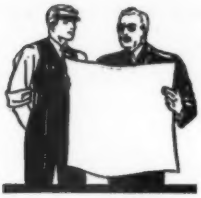
"We have passed in our national history from a period of exploitation, speculation, and development into a level period of operation in which fewer engineers will be needed."

(MRS.) SARAH LIMBACH
State Secretary of the Socialist party.

"Public utilities should be made publicly owned utilities and the profits should be used to run our schools, extending the facilities of the school system to a larger scope, including a junior college."

DONALD R. RICHBERG
General Counsel, National Recovery Administration.

"It is my personal belief that there is a half-way house—a house of democratic coöperation and self-discipline—which lies between the anarchy of irresponsible individualism and the tyranny of state socialism."



PROVISION AND ACCOUNTING FOR

Retirement of Utility Labor

Pension requirements held to be a legitimate operating expense and one that should be provided for by proper charges and accounting in order correctly to measure labor costs.

By EDWIN C. McDONALD

ARE utilities correctly measuring labor costs? Take an analogous situation.

The plant and equipment of the electric light and power industry represent an investment in round figures of $13,000,000,000. Electricity sales to consumers in 1932 produced gross revenues of $1,850,000,000.

Suppose the industry should say to its owners in 1934: "We don't believe your thirteen billion dollar investment for plant and equipment will ever need replacement. Therefore we have decided to ignore any further reserves for depreciation and obsolescence and pass the saving on to the consumer in reduced rates. If equipment does wear out at any time, we will charge operating expense at the time of replacement."

It is not difficult to imagine the astonishment and horrified protests that would greet such an announcement. Holders of securities and accountants generally would rise up in alarm. Even public service commissions would undoubtedly deny the utilities under their jurisdiction permission to pursue such an unsound accounting practice.

"Why does your company set up each year substantial reserves for depreciation and obsolescence?" the president of one of the country's largest utility systems was recently asked.

"We must always anticipate replacement of equipment," he replied. "Each year's revenue bears its proportionate charge of this replacement reserve. In this way we keep our plant up to date, our equipment fresh, and the whole physical lay-out at top efficiency."

THE financial officer of a large insurance company, with several hundred millions invested in securities of the Electric Light and Power group, was asked about depreciation reserves. His comment was:

> "Obviously without advance financial provision for the replacement of its plant and equipment, no utility statement would

reflect the true financial picture of the business. Earnings would be cut drastically in a year of major replacements and the peaks and valleys in operating expense would seriously interfere with any forecast of normal earnings. Under these circumstances, we could not justify an investment in the company's securities."

In measuring labor cases wouldn't it be just as illogical to ignore depreciation reserves as to follow the practice pursued by many utility systems in ignoring the creation of reserves against the replacement of old, superannuated employees?

The corporation whose president was quoted earlier in this article is making retirement allowance to certain old employees based on a rather definite set of rules. These rules establish the pension age, the amount to be paid, the minimum service required to receive an allowance, etc. Now this very company has a considerable number of long-service employees. The management cannot logically assume that no liability exists when their retirement is definitely assured under the terms of the Pension Plan.

Of course some employees will die and some will leave the company's service before reaching pension age. In the construction of the modern Retirement Plan, these factors are usually taken into consideration. In this fashion reserves may be established each year during the employee's active working lifetime, so that funds are on hand to pay the pension when replacement is necessary.

But today many utility companies fail to recognize that labor costs should include adequate pension reserves—that the human element in the business should stand an annual depreciation charge in much the same fashion as the physical property is depreciated. Such reserves are a legitimate operating expense and unless provided for constitute a *hidden* accrual each year.

Some simple arithmetic may help to clarify this point.

Assume an organization consisted of a single employee who works faithfully from age thirty until age sixty-five, when he is granted a pension of $100 per month for life. No reserves have been set up during his thirty-five years' service and even on the eve of his retirement no liability exists. Yet suddenly at age sixty-five he is retired and becomes a liability overnight for $12,000. The present value of $100 per month for life at sixty-five is $12,000. It would be strange accounting, indeed, that would permit a liability, so far as the company's books are concerned, to jump from zero to $12,000 in twenty-four hours.

During all those thirty-five years labor costs would not have been paid in full and consequently stockholders and consumers during these years would have benefited to the extent that a portion of this labor bill had been postponed. For this single employee who neither died nor quit, the company could have assured the pension of $100 a month, commencing at age sixty-five, by setting aside approximately $3 a week.

The pension suggested is typical of many plans, namely approximately half pay, for the employee entering at age thirty. It is apparent, therefore,—still considering the individual example—that a trifle more than 6 per cent of pay ($2,400) will produce the required pension. Is it fair to re-

Pension Benefits Should Be Adequately Funded Yearly

"THE pressure of rate reductions and increased taxes would appear to make it doubly important for a public utility, at this time, to make certain that liabilities assumed through the announcement of definite pension benefits are adequately funded each year as the liability accrues rather than to defer the charge to a succeeding management and ratepayer of the future."

port the payroll without adding an appropriate charge for pension reserves?

Of course it isn't necessary for the company to pay the whole bill. Modern retirement plans almost without exception invite employee participation. Assume, therefore, that our single employee does his part and contributes 3 per cent of his pay, or $1.50 each week. This leaves 3 per cent, or $1.50 a week, for the company to pay.

Doesn't the 3 per cent as to those employees who stay with the company until retirement, belong very properly in the total bill the company pays for labor and consequently in the rate base as a perfectly legitimate operating expense? Isn't the 3 per cent in the same bracket, for accounting purposes, as the reserve for depreciation of equipment?

INSTEAD of a single employee, assume a corporation has a total working force of 1,000 employees. What then? Not all employees are age thirty on the adoption of the plan. Many are young with a short past service. Others are old with a considerable past service. The employee's contribution would be returnable, in the event of death or withdrawal prior to retirement, and the basis of the company's contribution might well take into consideration the savings in premium payment due to prior deaths and withdrawals. Hence the cost of a plan for a particular company would depend upon its personnel data. However, as a single estimate, for the average public utility, a satisfactory plan could be developed for a current outlay within 3 per cent of payroll, plus, of course, additional deposits for a period of years to gradually liquidate such past service credits as are recognized.

Would not a public utilities commission sitting on a rate case look as favorably on the creation of reasonable pension reserves, especially in coöperation with employee contribu-

tions, to such a reserve as it would on any other item which forms part of the gross operating expense of the company?

SUPPOSE a utility concern could buy its supply of coal for use in 1933 on an agreement by which payment for the fuel would be deferred for thirty-five years—until 1968. Even should the management prefer to operate on what would appear to be "free fuel" and exclude the item from its operating expense, it is likely the public service commission would insist that the bill for coal—payable in 1968—would have to be included in operating expense in the year in which the coal was used, thus forming its proper share of the total cost of producing electrical energy that year. Doesn't such a charge properly belong in the basis of rates?

Carrying our example over into pension reserves, isn't it just as true that the present value of pensions to be paid in 1968 has an appropriate place in the current basis of rates? Consumer and stockholder should pay as they go and pension credit accruals arising out of service by employees in 1933 should be covered by reserves established in 1933.

A vivid example of failure to fund pension liabilities as they were incurred is furnished by a large eastern railroad system which in 1900 disbursed $235,174 in pensions and in 1924 paid $4,194,023 for pensions. Even more startling is the fact that pension disbursements increased 100 per cent in the next eight years, for in 1932 the railroad paid over 8 millions in cash to some 10,000 pensioners.

FROM the meagre reported decisions available it certainly would appear that expenditures by utilities for the purposes of pensions can properly be included in a public utility's operating expense. There are six decisions that sustain this conclusion and apparently no contrary ruling has been made. There is a further conclusion sustained by two of the decisions that the manner and method for setting up pension systems is to be left to the discretion of a utility's management and will not be disturbed in the absence of evidence of unreasonableness.

A decision in connection with the Milwaukee Electric Railway and Light Company suggests that the Wisconsin commission is in favor of a *scientific* pension system rather than a mere charge of current actual pension disbursements to current operating expense.[1] The commission states:

> "In the audit report, the provision . . . for relief and pension was adjusted to equal the actual expenditures for relief and pension association work, plus the amounts actually spent for pensions. It appears to us that provision made on such a basis as this is likely to be inadequate as time goes on, . . ."

IN the case of the Mutual Telephone Company the Hawaiian commission indicates that pension reserves belong in the same bracket with depreciation reserves.[2] An annual allowance for a special fund for pensions was authorized as an expense of operation to be handled in the same manner as a depreciation fund.

In the case of the city of Erie *versus* Mutual Telephone Company, the following conclusions may be of special interest, particularly those referring to

[1] P.U.R.1918E, 1, 45.
[2] P.U.R.1921B, 209.

the handling of funds for past service credits:[3]

> "Current expenses incurred by reason of pension-fund provisions adopted by a utility, as well as the method adopted in making such provisions, are matters of discretion for the officers of the utility company.
>
> "A utility itself should bear the cost of establishing a pension fund to the extent of recognizing the estimated past accrual costs during a period for which pension requirements had not been provided.
>
> "Future utility operating expenses cannot be made to bear the past accrual costs of a pension system which the utility company subsequently finds imperative and for which no provision was made during the period covered by the accrual."

IN connection with the desirability of complete segregation of pension reserves from the assets of the utility and with special reference to the necessity of placing a definite pension label on an irrevocable basis for these pension reserves, the following synopsis of opinion and order by the public service commission of Wisconsin, may be of more than passing interest. The issue arose in connection with the Wisconsin Telephone Company.[4]

> "Pension accruals, which amounted to over a quarter of a million dollars in 1931, we allow for purposes of the temporary order, reserving the right to disallow this item in the permanent order unless the company establishes a pension fund system which more surely guarantees the rights of the workers in the fund. We point out that the pension trust agreement does not represent a binding trust at all and that it is highly questionable whether there exists any contract on the part of the company to hold the pension fund for the benefit of the employees or whether this fund is merely a disguised surplus available to the stockholders.
>
> "We require the pension accruals, employees' benefits, and relief department expenses to be apportioned between construction and operating expenses.
>
> "The result of our adjustment of this account is that operating expenses are reduced from $343,189 to $283,625, or a decrease of $59,564."

THE pressure of rate reductions and increased taxes would appear to make it doubly important for a public utility, at this time, to make certain that liabilities assumed through the announcement of definite pension benefits are adequately funded each year as the liability accrues rather than to defer the charge to a succeeding management and ratepayer of the future. By making the charge currently as a part of current operating expenses where it logically belongs, the full labor cost will be reflected in the company's operations and, therefore, help to establish a satisfactory basis of rate which will be fair to consumers, stockholders, and management.

Within slightly more than a year, the management of certain well-known utilities have recognized the importance of setting aside reserves for the depreciation of the human element and have adopted scientific retirement systems under which the employee contributes a portion of the cost.

The establishment of sound pension practice by such organizations as the Los Angeles Gas & Electric, Rochester Gas & Electric, Southern California Gas, Central Hudson Gas and Electric, Kansas City Power and Light Company, Southern Counties Gas Company, and the American Water Works & Electric Company is eloquent testimony to the advantage of correctly measuring labor costs and undoubtedly will stimulate action by other companies in the same field.

[3] P.U.R.1931A, 169.
[4] P.U.R.1932D, 173. Summary by former Commissioner David E. Lilienthal.

OUT OF THE MAILBAG

Erratum

On page 509 of the October 26th issue of PUBLIC UTILITIES FORTNIGHTLY, under the heading *"Nebraska"* it is stated in part:

> "A tax of 2 per cent of gross from domestic and commercial sales and 1 per cent of gross from industrial sales of electricity is in effect."

This statement is in error. There was introduced at the 1933 session of the state legislature, a bill known as Senate File Number 71. This bill proposed to set up certain "privilege taxes" on substantially all business conducted in the state of Nebraska, and included the tax you mention.

The bill did not receive approval of the legislature and did not become a law.

—ROY PAGE,
Vice President and General Manager,
Nebraska Power Company
Omaha, Nebraska.

Never A "Yale Professor"

In PUBLIC UTILITIES FORTNIGHTLY, November 9th, on page 598, you state that the question referred to has been placed squarely before Attorney General Cummings in a memorandum prepared for him by "Yale University Professor Albert Lévitt." Mr. Lévitt is or was a resident of Connecticut. I believe that he was a member of the Connecticut Bar. He was never connected with the faculty of Yale University. I don't think he graduated from there, although it is possible that he did. At one time I believe he was a member of the faculty of a law school in the state of New York—I've forgotten the name of it. Under any circumstances, however, I don't think he is properly described as a "Yale University Professor."

—C. L. CAMPBELL,
Vice President of the Connecticut
Light and Power Company.

EDITORS' NOTE.—Law Professor Albert Lévitt is not properly described as a "Yale University Professor." He graduated, B.A., *cum magnis honoribus,* Columbia, 1913; LL.B., Harvard, 1920; J.D., Yale, 1923. He has served either as lecturer, acting professor, assistant professor, or professor at Columbia, Colgate, George Washington University, University of North Dakota, Johns Hopkins Medical School, Washington and Lee University, Brooklyn Law School of St. Lawrence University, but never at Yale.

The Re-sale Price Schedules of the TVA

I am sorry to see in an article in your December 7th issue a repetition of the misleading statement that the resale price schedules of the TVA require the distributing company or municipality to resell for 4 mills what they buy for 7 mills.

Any one writing on the subject should obtain their information from headquarters rather than from erroneous statements appearing in the daily press—in this case, had such a course been followed, the author of the article in question would have found that the wholesale price is not 7 mills but is $30 per kilowatt per year.

This price, as Mr. Lilienthal has correctly stated, will result in an average price of 7 mills at 50 per cent load factor. Therefore, additional energy, provided it does not increase the billing demand, such as off-peak water heating, is obtained for nothing against a resale price of 4 mills.

Those who criticize the TVA will make a much stronger case if they will avoid such misinterpretation of what is being done by Mr. Lilienthal.

It is probably true that the TVA press releases leave much to be desired in the matter of frankness—they do not tell the story in such simple words that the public can understand; but they, together with the TVA contract executed with the city of Tupelo, if read carefully, disclose a program which can well receive the coöperation of the industry, namely, the development of large usage in the home.

To the industry the essential feature is the public admission on the part of the Federal

government that, in order to give a rate of 3 cents for present volume of use, a subsidy in the form of a "developmental surcharge" is essential. The fact that the form of same may be impracticable or undesirable is wholly immaterial as compared with the official admission that charges in excess of 3 cents for 50 kilowatt hours per month made by private companies are not robbery but a necessity unless some one acts as Santa Claus to make up the deficit.

The powder of the antiutility propagandists seems to me to have become suddenly quite thoroughly wet and all because the director of the TVA program is willing to honestly write into a contract the economic fact which has heretofore been strenuously denied, namely, that a subsidy is necessary.

—SAMUEL FERGUSON,
President, The Hartford Electric Light Co.

Unsound and Inequitable Theories of Taxation

"PUBLIC UTILITIES FORTNIGHTLY" for December 21, 1933, quotes David E. Lilienthal, General Counsel of the TVA, to this effect:—"A public power system should bear the burden of taxes which it would pay if it were privately owned."

This is a *remarkable* remark, and I wonder whether its inclusion under the caption, "Remarkable Remarks," was not the least bit ironical? Years of observation and reflection have convinced me that the imposition of *any* form of taxation upon the business or needed property of public utilities and common carriers, other than motor vehicle licenses and excess profits taxes, is unsound in principle and generally inequitable in application. These businesses are so heavily fraught with public interest that to subject them to the general run of taxation is as sensible as assessing the city hall and the public schools. The taxes imposed upon them are thrown directly back to the consumers,—with a percentage added,—and seem to take effect in roughly inverse proportion to the amount of service required.

Where the amount of taxation is honestly considered in fixing industrial rates, the resulting rates frequently discourage all but limited industrial use. On the other hand, the small domestic consumer is subjected to discrimination wherever industrial rates are framed to entice the industrial consumer into the service area and to use the local company's service. The encouragement of industrial consumption may be effected without prejudice to small consumers by the elimination of hidden taxes from the bills for service. The exemption of utilities from general taxation would also end the widely current practice of balancing purely local budgets by means of taxation affecting the rates established over the entire contiguous service area, and by means of which an entire district contributes to the fiscal well-being of a single community within it, according to the latter's profligacy.

THE glaring inequalities of taxation applicable to rail and highway carriers would be wiped out at a single stroke by the elimination of taxes at present borne by them. The railways' complaint that their tax contributions are used to provide, maintain, and carry facilities for competition destructive to themselves would cease to be heard, and the problems of bus and truck regulation would become elementarily economic rather than arbitrarily juridical. Gone would be the thousand and one taxes, costly to account for upon the corporate records, from the ridiculous "personal property" taxes to the petit larceny of school taxes which impute the possibility of paternity *to a corporation*, a condition unknown in biology and only delicately touched upon by LeSage in his reference to a "committee of fathers" in "Gil Blas." Gone, also, would be the barriers to fair comparison of private with public projects. The wages of rank and file employees could, as they should, be handsomely increased. Rates would come down. Industry would thrive. The spread between personal (or business) incomes and expenses would widen leaving plenty of room for the additional *direct* taxation required to make up for the exemptions granted utilities and common carriers,—with a real overall saving to the taxpayer.

—ALBERT J. FRANCK,
Richmond Hill, N. Y.

¶ "OUR *greatest weakness is that we have done a job so well that it has become a commonplace in the lives of the people. Service failures are unheard of and even the annoyance of delays or inadequacy has been overcome until there exists a dependability that is taken for granted as involving little of investment or expense in maintaining its habitual monotony.*"

—E. M. THARP,
Vice President, The Ohio Fuel Gas Co.

What Others Think

Do Utility Consumers Fix Their Own Rates?

DANE York, writing in *The American Mercury,* relates a story that is a classic in department store circles. It appears that the head of a ribbon department once found a manufacturer pressed for cash and bought many thousand yards at about 9 cents a yard. It was regular 39-cent ribbon and it had that quality. Yet a sales ticket on the subsequent retail display at 29 cents failed to move the stock. The disappointed manager then prepared an advertisement offering the lot at 19 cents but, by a curious chain of mishaps, the advertisement appeared with the price at 59 cents; even the counter cards were so marked. When the mistake was discovered later in the sales day, the surprised manager found that the entire batch (that would not budge at 29 cents) had rapidly melted away at 59 cents before a milling mob of thrifty women eager to take advantage of such a "bargain."

Mr. York goes on to give other authentic instances of how the public makes and insists on its own price levels, even though such levels are far out of line with wholesale costs. He tells of a New York jewelry store "compelled" to sell imported pearl necklaces costing $18.26 wholesale at $150 because its clientele "would have sniffed in disdain if the price had been set at $50!" Mr. York himself admitted buying over twelve years ago a German cuckoo clock for $22. He was satisfied with his purchase. It kept good time and made a good appearance. Above all, it cost what he expected "a good cuckoo clock to cost." He found out, however, that the total landed price to the New York merchant was only $1.26. He admitted further that he would not have bought it at $5 or $10 because he "would have suspected a clock at that price." Mr. York concluded:

> "The seasoned merchandiser does not see profiteering in such cases; he sees, rather, a skilful adaptation of prices to what the public expects. He knows that no merchant can sell above that expectation; he knows also that sales are lost if prices run too much below it. And the expectation-level varies even in two stores side by side on the same street.
>
> "So in the last analysis the public makes its own prices; it makes also, if you please, its own profiteering. It does so whimsically, inscrutably, without seeming rhyme or reason; its ways fit no cost-and-profit formula. Therein lies the great mystery of retail price."

To the experienced merchandiser there is no end to this mystery of retail price. The figure at which an article will sell readily is often found to have no relation whatever to its cost and very little to its quality. It is largely a matter of public education, expectation, or caprice (call it what you will) in price levels for a certain article. Strenuous competition in the sale of a particular commodity wears down such artificial or arbitrary public expectation over a period of time, but while it lasts the merchant paradoxically must often raise his prices to sell his goods.

When we apply this thought to utility rates we can see that rates are very often fixed by the same expediency—public expectation. Persistent education of the public of a given community to a comparative level of utility rates in another community will bring demands for such rates without regard to differences in operation costs, capital structures, or other variations between the two plants compared. In the utility field, however, the pressure of public opinion is invariably towards a lower level of prices.

Legally, of course, utility rates are

supposed to be fixed solely upon the basis of cost proven in each particular case. Comparison of utility rates between communities has time and again been ruled out as a test of reasonableness by courts and commissions, but the average local public still demands utility rates as low as those prevailing in a neighboring city, a neighboring state, or a neighboring country (depending upon which appeal was made during the process of its price "education"). The lay consumer of Smithville knows little and cares less about the intricacies of rate valuation, depreciation, return, and what not. He only knows and resents very much that he has to pay more for his gas, electricity, telephone, or water service than his cousin over in Jonesville. Or, to reverse the situation, he may be perfectly contented and pleased that he pays less than his mother-in-law who lives over in Brownsville. Attempted technical explanations of the differences of respective operating conditions generally leave him cold. He only cares for the figures that are printed on his monthly bill.

COURTS and commissions have avowedly repudiated this factor but consciously or unconsciously they have often considered it as their rate opinions will show. For what other purpose could "tentative comparisons of rates in different cities of the state" be included in an opinion if not intended at least as an explanation to a price expectant public.

During the depression years, the movement away from absolute cost, plus reasonable profit basis in rate fixing, has become more pronounced. First there was the revival of the "value of the service" criterion in rate fixing, which was in some way related to "what the customer can afford to pay." Now comes evidence that commissions will be asked to fix utility rates, not only upon what the customer can afford to pay, but what the customer expects to pay and even *what the customer intends to pay*—all this regardless of the cost of the service.

It would ordinarily be premature to comment upon argument of counsel in a case prior to a decision therein, but a recent argument before the Massachusetts Department of Public Utilities is so unusual in this regard that it might well be set forth here, even though a decision had not been reached at the time of this writing. The department was asked on December 30, 1933, to consider whether the public or the investors should receive preference at the hands of the utility regulatory board.

THE state laws provide that the investor be entitled to "fair and reasonable return." The commission has always proceeded under this statute on the theory that this return should be granted on money honestly and prudently invested, thereby giving birth to the "prudent investment" theory. On the other hand, the law provides that the rates of utilities should not be excessive, unreasonable, or discriminatory and it has been under this act that the commission exercises its authority of protecting the public.

The new issue was raised in a petition of the selectmen of the island of Nantucket for a reduction in the rates of the Nantucket Gas and Electric Company. Attorney Wallace H. Walker, counsel for the town, argued before the commissioners that the public, by greatly outnumbering the investor, should be given the first consideration by the commission and a reduction in rates should be granted regardless of whether it resulted in the company's operating at a loss.

ATTORNEY Henry Mayo, counsel for the company, declared the commission should allow the investor a reasonable return even if it meant a rate of 50 cents per kilowatt hour. He warned the commission of the statutes governing protection to the men and women who use their funds to build up a utility.

Walker congratulated Mayo on his frankness and added:

"Is electricity a luxury or is it a public service that should be paid for by the peo-

ple in reasonable rates? That, Mr. Commissioners, is the issue. You can forget all others."

Both lawyers urged the commission to make its decision plain. "Make it plain even at the expense of being tactless," Walker said. "Tell the people the reasons for the position you take for, if you don't, they will be back here in six months in another rate case or initiating proceedings under the law which allows a municipality to establish its own lighting plant."

THE *Electrical World* editorially admits that a strict cost of service basis is no longer the all-prevailing test for rate fixing. It stated:

"Utility enterprises serve customers and collect money for this service. If any one wishes to judge one of these enterprises it is necessary to look at the over-all investment costs, operating costs, and net earnings over a period of years. These data will show how much money has been made or lost and will give the information necessary for fixing rates that are reasonable and adequate. Rates are made to give the money necessary to sustain the enterprises and are not based on detail cost allocations, and cannot and should not be so based. The industrial power rate is fixed by competitive conditions, the domestic rate is placed as low as possible in order to induce usage and to please the voters of the community, and the commercial light and power rate is based upon value of service very largely.

"Rate making is a business with both a historical and practical background and is not a formulistic technical result arrived at by making inventories of facilities and detailed accounting analyses. Nor is it based upon some theory whereby investment and operating charges are allocated to classes of customers upon the basis of demand and consumption. This type of analysis is valuable only as a reasonable check upon conclusions reached by a more practical approach."

These views lead us to a somewhat unorthodox opinion that as a practical (as distinguished from a legal or theoretical) consideration the reasonableness of utility rates is more of a matter of public opinion than exact formula. If utilities, protected as they are by natural monopolies, were permitted to fix rates based on what the traffic will bear, no doubt they could perhaps see that the public is educated up to price levels comparable to Dane York's idea of "what a good German cuckoo clock ought to cost." Probably the same citizen who now complains bitterly over a $2 electric bill would pay $20 for the same service without question if it were customary to do so. Fortunately for the development of utility service, as well as the public pocketbook, rates for utility service were based during their earliest periods upon the cost of the service plus a fair profit. Now the pressure of public price expectation attacks the utility rates from the other end. The cheapest particular utility rates of this country and others have been publicized so often that individual utilities not having (for good, bad, or indifferent reasons) rates comparably low find themselves exposed to demands for rate reductions to similar levels.

THE editor of *Public Service Magazine* points out that such demands often proceed from the failure of the customers to understand the cost of serving them. He stated:

"There is a good deal of talk about rates these days, but the ordinary citizen doesn't understand much about how he can get lower rates, nor does he understand that his utility company wants low rates just as much as the customer wants them. And why? Simply because low rates mean volume of business. . . .

"If the domestic users of electricity had been as alive to their opportunities as the users of electric power, they would undoubtedly have much lower rates today than they have. Every year sees an increase in the number and kind of electric appliances available for home use. If advantage were taken of these appliances the customer would get a lower rate, the company would make more money, and everybody would be happy. If the companies had spent as much effort in building up volume consumption among domestic consumers as they have among power users, there would be a smaller differential between domestic and industrial rates than there is today. The home is becoming more and more a user of power rather than of lighting exclusively, and as this use increases the domestic consumer will be more and more entitled to a power rate. But

the responsibility is at least partly the customers."

ANOTHER constant source of misunderstanding between utilities and consumers is the case of the small consuming patron. The editor of *Industrial News Review* stated on this point:

> "The average private utility has many customers who either do not pay for the cost of the service they receive, or pay but part of it. The cost of maintaining facilities that provide them with gas or electricity when they want it, is greater than the charges for the small amount of service they use. The utility continues to carry them because the law requires it. A multitude of proposals for equalizing this condition and putting all customers on a paying basis, have met with immediate political opposition and have been defeated. And, consequently, an appreciable percentage of the average utility's customers are a burden to the company, and to the other customers who pay for what they get.
>
> "Many demands for drastic utility rate reductions are based on the political premise that the nonpaying customer should be the favored one. The reason for that is obvious: Votes. And the upshot is that much of the best work done by state commissions has been destroyed or hampered by political influence and legislation that is entirely without economic justification. That's a matter that should be brought to the attention of the great bulk of American citizens who pay for the utility services they get, and are entitled to a fair deal."

Regardless of these popular misunderstandings of utility costs, there are those who believe that utility rates, particularly electrical utility rates are generally too high. They believe this regardless and without any definite study of the property investment or operating costs involved in particular cases. Law Professor Albert Lévitt, special assistant attorney general of the United States, is of such persuasion. Writing in the *New York Times*, Professor Lévitt stated:

> "It is my belief that practically every light and power company in the country is receiving enough money under the existing rates not only to absorb all the increased costs due to the NRA but to absorb such costs and, in addition, reduce its charges without in any way impairing either its efficiency or its financial standing.
>
> "The operating companies of the United States are in the main sound and capable of producing more than enough income to meet all legitimate demands which can be made upon them. The difficulty lies in the holding companies and superstructure with its millions of dollars of 'watered stock' and overvaluation."

PERHAPS it is publicly articulate figures such as Professor Lévitt who are "educating" public expectancy in the matter of utility prices downward to a point whereunder some utility may find it difficult or impossible to operate.

—F. X. W.

"THEY MAKE US GYP 'EM!" By Dane York. *The American Mercury*. December, 1933.

THE COST OF DISTRIBUTION. Editorial. *Electrical World*. December 9, 1933.

THE CUSTOMER'S FAULT—PARTLY. Editorial. *Public Service Magazine*. December, 1933.

NON-PAYING CUSTOMERS. *Industrial News Review*. December 23, 1933.

UTILITIES UNDER THE NEW DEAL. By Albert Lévitt. *The New York Times*. November 26, 1933.

Can Communications Combine?

SHORTLY after the inauguration of President Roosevelt, an interdepartmental committee under Secretary of Commerce Roper began the task of probing the field of communications, both wire and wireless, for the purpose of recommending any changes required in the interest of the public or of the industries involved. Last December this committee handed the administration a report suggesting three optional plans for action: (1) the government can leave the field strictly alone, or at least let it function under the present state regulation (and limited I. C. C. regulation); (2) the government can acquire and operate itself all these communications' agencies, such as is the

practice on the Continent; (3) the government can permit retention of private ownership and operation, but insist upon strict Federal regulation following drastic reorganization and consolidation of these agencies in the interest of operating efficiency and economy. The report left little doubt that the members of the committee, for the most part, favored plan No. 3. Since No. 3 is more likely, therefore, to receive attention of the present congressional session, and since we already know how plan No. 1 works and see little likelihood of plan No. 2 being seriously considered, let us address our attention to the third suggestion.

THIS plan visualizes the segregation of all electric communications business of the country into three groups: (1) the land line telegraph business would be merged under one head, thereby ending America's most prominent business rivalry: Western Union and Postal Telegraph; (2) the telephone business (already pretty well merged) would receive similar treatment for the second group; (3) all the other present odds and ends of communications, such as marine cable, radio, and radio-telephony would bring up the rear group. The corporate realignment would be accomplished by interexchange of securities and the net result (so runs the theory at least) would be the concentration of all business in each field under a single company, each directly responsible to a Federal controlling agency (either an extended organ of the I. C. C. or, as Senator Couzens has suggested, a newly organized Federal Communications Commission, which might or might not swallow up the present Federal Radio Commission).

PRINCIPAL benefits to be derived from the plan were as follows: (1) elimination of waste (Secretary Roper declared that the Western Union-Postal Telegraph combine alone would save about twenty million dollars a year) in the maintenance of unnecessary duplicate facilities resulting in (2) increased operating efficiency as well as (3) cheaper rates to the public by reason of sharing in the operating economies accomplished; (4) Federal regulation of agencies hitherto unregulated (except in a very limited way) was also suggested as a desirable end.

PRINCIPAL objections raised were as follows: (1) a great monopoly would be born and (*horribile dictu*) born under the spreading wings of the Blue Eagle with Uncle Sam in the rôle of accoucheur and that (2) effective regulation of such a "legal trust" would be impossible; and (3) either higher rates to the public would result or the public would not get its equitable share (by way of reduced rates) of the economies achieved; (4) as a result of wholesale consolidation and deflationary reorganization many people would be thrown out of work at a time when increased employment is a national problem.

Answering the last objection first with specific application to the telegraph merger, the *Financial World* suggests:

> "Both (telegraph) companies have a relatively large number of employees which have passed the retirement age and could be pensioned off to make room at the top. Furthermore, any improvement in business would require larger staffs as both companies have reduced personnel to a minimum during the past year or two. It is believed that productive employees of both companies could be absorbed by the consolidated unit within a space of two years."

SPEAKING of the telephone end of the business, the *Financial World* tells us that more opposition could be expected:

> "To bring this about would not be as simple a task as merging the telegraph facilities and any efforts in this direction would certainly encounter strong opposition, both from American Telephone and Telegraph and the many smaller independents. And it appears that there is little to be gained by such a consolidation. So far as service is concerned, the telephones of this country are practically 100 per cent interconnected. There are few communities left which have dual telephone service. It appears that aside from facilitating Federal regulation, consolidation of the tele-

The Washington (D. C.) Post

NEW RÔLES FOR UNCLE SAM

phone business under a single head would accomplish little constructive purpose. . . . . Many of the smaller independents and communities served would likewise resist such a move as it would mean substitution of local ownership and operation for absentee control which is not popular in numerous sections of the country."

THE progressive Senator Dill (D.), of Washington, chairman of the Senate Commerce Committee through which the plan must clear if enabling legislation is to be enacted, is quoted by the press as follows:

"You will create a monopoly and though

you may talk of control, experience with the telephone has shown that the regulatory bodies themselves are finally controlled."

SENATOR Dill's antagonism to the proposal which would allow a combination of the systems under a Federal regulatory body comparable to the Interstate Commerce Commission, rests largely on the radio situation which might follow. He observed that a merger would combine the International Telegraph & Telephone and the American Telephone and Telegraph companies which between them dominate the international radio field.

It had been suggested, Dill said, that radio properties be segregated to maintain radio cable competition. He said:

"The weakness in that suggestion is that all radio communications would have to be relayed to the radio sending stations by telegraph. With telegraph companies allied with the cable companies there naturally would be favoritism for the cables."

THE conservative *Chicago Tribune* likewise opposes the merger plan but for other reasons. The *Tribune* fears that it is but a prelude or mask for a subsequent drive of socialistic politicians to put over plan No. 2. It further stated editorially:

"The government proposals regarding communications, viewed in other aspects, raise still other questions. By and large the private management of these communications has made a notable success in withstanding the depression. It has conserved the interest of the investors and has kept up the standard of service to the users. The contrast between conditions under private management in these hard times and conditions under the government control of railroads would not in itself inspire a sensible man to bring the free communications under the system which has oppressed the rails. The logical reason which would divert government attention at this time from what it regards as the sick industries, for which it must find salvation, to enterprises which are doing very well without government interference would not be easy to find. Of course if we are seeking the totalitarian state, the successful private enterprises must not be allowed to stand as conspicuous illustrations of the fact that the totalitarian state is not needed. History of railroad regulation would utterly fail to justify the government's appearance at these other private doors, but if the state is to be all in all and the public administrator everybody's master, then the success of a private industry is its death warrant just as distress in another industry is a death warrant for it."

THE *Dallas* (Tex.) *News* feels that the merger would be desirable if strict regulatory control could be provided. It stated editorially:

"American companies complain of disadvantages in competing internationally because other governments permit consolidation. In this country, there is in both telegraph and telephone lines costly duplication that could be avoided. The tendency in merger toward monopoly rises as a bar in public opinion and only government control of rates can supply protection against it."

The chances of action on the measure at the current congressional session are problematic. The veteran politician journalist, J. F. Essary, declared in a signed article in the *Baltimore* (Md.) *Sun* that "the Roosevelt administration is virtually committed to such a policy and is only waiting" for approval or modification of the written plan. On January 11th an Associated Press dispatch brought news of a statement by Senator Dill that a special committee created at the request of President Roosevelt had approved of plans for a new Federal communication commission that could fit in with plan No. 3 of the interdepartmental report described above. These two statements taken together would indicate that the plan may go over before the next summer, but most Washington "observers" informally agree that there is too much disagreement to permit action at this session.

—F. X. W.

THE ELECTRIC COMMUNICATIONS MERGER. *Financial World*. December 27, 1933.

THE GOVERNMENT REACHES OUT AGAIN. Editorial. *Chicago Daily Tribune*. December 15, 1933.

UNIFIED COMMUNICATION. Editorial. *Dallas Morning News*. December 16, 1933.

"The Valuation and Regulation of Public Utilities"

THE authors of this book have had intimate contact with the matters of which they treat. The senior author was connected for several years with the bureau of valuation of the Interstate Commerce Commission (also president of the American Economic Association in 1914), and the junior author was at one time expert counsel on valuation for the public utility commission of Washington, D. C.

The thesis of the book is that regulation is a failure, and the primary responsibility for the failure is laid at the door of the courts.

The authors assert that the courts, through a series of decisions extending over many years, have arrogated unto themselves powers of regulation which they are administratively incompetent to exercise. Despite the fact that the Supreme Court in the Granger Cases (1877) denied that it had any right to inquire into the propriety of legislative action with regard to rates, it later, in Chicago, Milwaukee and St. Paul *v.* Minnesota (1890), asserted that right. Then, in 1898, came Smyth *v.* Ames, where the court held that the compensation constitutionally protected is a fair return on the fair value of the property. The authors characterize Smyth *v.* Ames, which introduced concepts unknown to the market place and foreign to economic analysis, as the crowning decision leading to the emasculation of effective regulation. And finally in 1920, by the decision in the Ben Avon Case, in which it was held that the Federal courts could review not only the law found in the state courts below, but also the facts, the Supreme Court at one blow destroyed the whole conception of regulation by expert commissions. Under this decision cases are tried anew in the Federal courts, not on the basis of the findings of the state commission, but on the basis of the findings of the special master appointed by the court in each case.

THE public utilities, for their part, have been by no means slow to avail themselves of the rights and privileges extended to them by these and other favorable decisions of the courts; and by recourse to protracted trials and judicial reviews they have succeeded in reducing utility regulation to such confusion that for all practical purposes the regulating statutes have virtually ceased to exist as operative law.

There are, to be sure, laws framed in the public interest, and the commissions go through the motions of pretending to safeguard the public rights. But the records show, say the authors, that only so much regulation exists as the Supreme Court wills. Moreover, the Supreme Court has not developed clear principles of law even for its own guidance, let alone the guidance of the lower courts and the commissions. The law is simply what the Supreme Court, for the time being, considers desirable. And since no commission can long hold the respect of the citizenry, if it is being constantly overruled, most commissions deem it good policy to play safe. As a result, the commissions, which were originally looked upon as public servants whose primary duty was to safeguard the people from exploitation by private monopolies, now "often occupy a position halfway between an indolent public guardian and a somnolent county court."

THE authors conclude that until the people wrest from the Supreme Court the powers that properly belong to the legislative branch of the government, the court will continue to be "the greatest obstacle to effective regulation." The recovery of these powers the authors deem entirely feasible, since neither in the Constitution nor in specific legislation is the Supreme Court empowered to nullify state public utility rates, or to determine their reasonableness. All such powers have been de-

rived from legal fictions invented by the court after it had rejected the opposite doctrine of state legislative sovereignty long held by it. In the absence of constitutional limitations—and there are none in this case—Congress has unlimited control over the Federal judiciary. Therefore, so we are told, the solution is simple. All that is needed is the enactment of a statute vesting in the states full authority over state regulations, authority over interstate matters being vested in a Federal administrative body. —ELIOT JONES

THE VALUATION AND REGULATION OF PUBLIC UTILITIES. By John H. Gray and Jack Levin. New York: Harper. 1933. 143 pages. $1.

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AFTER REFLATION WHAT? A Short Exposition of the Commodity Dollar. By Irving Fisher. New York: The Adelphi Company. 1933. 137 pages. $1.50.

CURRENT MONETARY ISSUES. A general survey of the monetary issues which have dominated world economic discussions during the past year. By Leo Pasvolsky. Washington, D. C.: The Brookings Institution. 1933. 192 pages. $1.50.

GOVERNMENT IN THE UNITED STATES. By Claudius O. Johnson. New York: Thomas Y. Crowell Company. 1933. 696 pages. $4.

HANDBOOK OF THE SECURITIES ACT OF 1933. A Practical Manual for Security Issuers and Underwriters, Investors, Experts and Dealers.—Also for—American Holders of Foreign Securities in Default. By Simon Michelet. Washington, D. C.: Simon Michelet. 1933. 176 pages. $2.50.

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OUR ECONOMIC REVOLUTION. By Arthur B. Adams. Norman: University of Oklahoma Press. 1933. 196 pages. $1.50.

THE A. B. C. OF THE SECURITIES ACT 1933. Written for Laymen. By Ernest H. Newfield. New York: The ABO Press, Inc. 1933. 96 pages. $3.

THE FUTURE COMES. A Study of the New Deal. By Charles A. Beard and George H. E. Smith. New York: The Macmillan Company. 1933. 178 pages. $1.75.

THE TAX RACKET. What We Pay to Be Governed. By Ray E. Untereiner, Ph. D. Philadelphia & London: J. B. Lippincott Company. 1933. 162 pages. $1.

Other Articles Worth Reading

ANOTHER SIDE OF THE ELECTRIC RATE PROBLEM. *Industrial News Review.* December, 1933.

INFLUENCE OF RESEARCH, IN SCIENCE AND ENGINEERING, ON RELIABILITY AND ECONOMY OF RENDERING ELECTRIC SERVICE TO CONSUMERS OF THE BUREAU OF POWER AND LIGHT, LOS ANGELES, CALIFORNIA. By E. F. Scattergood. *Public Ownership.* November, 1933.

MAKE THE POLICY FIT THE FACTS. *Industrial News Review.* December, 1933.

MORE POWER FOR THE NORTHWEST. *Review of Reviews and World's Work.* January, 1934.

THE CENTRAL VALLEY WATER AND POWER PROJECT FOR CALIFORNIA. By Carl D. Thompson. *Public Ownership.* December, 1933.

THE COURTS APPROVE MILK PRICE FIXING. By John Bauer. *National Municipal Review.* December, 1933.

THE CRUSADE AGAINST UTILITIES. *Barron's.* December 25, 1933.

THE SECURITIES ACT OF 1933. By Joseph P. Chamberlain. *American Bar Association Journal.* November, 1933.

THE UTILITIES PROBLEM. By A. W. Conover. *Edison Electric Institute Bulletin.* December, 1933.

TVA GOES IN FOR CUSTOMER-FINANCING. *Barron's.* December 25, 1933.

UTILITIES FACE NEW ATTACK. By Joseph Stagg Lawrence. *Review of Reviews and World's Work.* January, 1934.

The March of Events

Security Owners Unite

ORGANIZATION of a national association of holders of public utility securities to fight "the forces that are depressing the fair value of utility securities" has been announced by Chester D. Tripp, president of the newly formed American Federation of Utility Investors, Inc.

"The federation intends," the announcement said, "to take definite action to prevent the destruction of public utility values. It does not matter if the destructive forces be set in motion by an act of government—Federal, state, or municipal—or by unscrupulous financiers and managers who have brought some of the units of the utility industry into disrepute. Every force that endangers the fair value of public utility securities will be vigorously opposed."

As a nucleus for the nation-wide organization, Mr. Tripp was quoted as saying that the federation had formed an advisory committee which already numbers seventy-five men to represent all sections of the country and practically all lines of business activity and the professions except the utility industry and investment banking. Headquarters of the new organization will be in Chicago.

New Canadian Project

PLANS for a $15,000,000 hydroelectric development and irrigation project on the South Saskatchewan river, just north of Riverhurst, Sask., have been completed and application for permission to proceed with the project has been made to the Saskatchewan Department of Natural Resources and the Federal Department of Public Works. The proposed development includes construction of a reinforced concrete dam to back up a body of water 100 miles long in the valley of the river, construction of a 100,000 horsepower electric power generating plant, construction of a 1,000,000-acre irrigation scheme, and also facilities to provide 10,000,000 gallons of water for the cities of Regina and Moose Jaw, if required.

Endorse Transportation Bill

THE endorsement of the National Association of Railroad and Utilities Commissioners and the Interstate Commerce Commission was given to the Rayburn bill for Federal regulation of interstate motor vehicle transportation. Commissioner Frank McManamy testified the Interstate Commerce Commission had advocated such legislation for ten years, while Hon. K. F. Clardy, member of the Michigan utilities commission, said the National Association of Railroad and Utilities Commissioners had sought such a measure for eight years.

In open hearings Chairman Rayburn (D., Tex.) stressed that although the recovery administration was considering a bus and truck code, he viewed control of interstate transportation as a legislative matter.

The Rayburn bill provides for the Interstate Commerce Commission to regulate both common and contract bus and truck operators, fix rates, protect the public and property through insurance, and to eliminate duplicating lines.

To Push Electrification

THE official publication of the Mexican government has printed a law "federalizing" the electrical industry. The measure was approved both by the Chamber of Deputies and the Senate nearly two months ago, but it was necessary to send the bill to the state legislature, the majority of which have now approved it.

The next step by the government will be the appointment of a national committee of electricity, the purpose of which will be to seek the electrification of the industry of the entire republic and to study the possibilities of erecting electrical plants throughout Mexico in order that every village will be able to enjoy electric light and power.

Lilienthal Heads EHFA

THE Electric Home and Farm Authority, a subsidiary of the Tennessee Valley Authority, on January 19th elected David E. Lilienthal its president and authorized execution of a contract with the Reconstruction Finance Corporation to guarantee $10,000,000 in credit for an electrification program in the Tennessee valley. Issuance of $1,000,000 in stock also was authorized.

Lilienthal is power director of the parent authority and recently negotiated a contract with private utility officials for purchase of distribution facilities with which to operate the government's "yardstick" power program in the Tennessee river basin.

Permanent headquarters of the new Authority will not be located in Knoxville, although that is its temporary headquarters, David E. Lilienthal announced.

"For the present, the EHFA is on paper, and I'm carrying it around in my brief case," Lilienthal explained. "We're entertaining invitations from several cities in the area to locate there. I think the headquarters should be a little more centrally located than it would be in Knoxville."

TVA Developments

RECENT developments in the realm of the Tennessee Valley Authority were fairly numerous but were of minor importance.

Amory and Corinth, Mississippi towns, by respective votes of 613 to 12 and 791 to 21, have voted to take advantage of connections with TVA.

Mayor Bass of Chattanooga, with City Attorney Anderson's opinion of the legality of the step to back him, states that citizens will be given an opportunity to vote on the acquisition of power plant facilities for the distribution of TVA energy there.

Knoxville has received a loan of $2,600,000 from the Public Works Administration for the construction of a distribution system for energy purchased from TVA. The city sought $3,225,000, which included the cost of future extensions.

Arizona

Seek Lower Utility Rates

NEGOTIATIONS between the Tucson Gas, Electric Light and Power Company and the city over natural gas and electric light and power rates are now under way. City officials are seeking the gas rate reduction for domestic consumers, and a reduction in electric light and power rates for the city's lighting system.

Two petitions seeking reductions in Tucson telephone rates have been presented to the city council by a citizens' committee. The first, bearing 500 signatures, was directed to the state corporation commission and asked for a 25 per cent decrease in present telephone rates. The second, addressed to the mayor and councilmen, urged that the city endorse and support the requests made in the first petition.

District of Columbia

Light Rate Cut Offered

OFFICIALS of the Potomac Electric Power Company, at a hearing before the public utilities commission on January 19th, offered a new schedule of rates for 1934 designed to reduce electric power bills by $378,918 as compared with 1933.

The amount of the reduction represents one half of the Potomac Electric Power Company's excess earnings above 7 per cent last year, according to the *Washington Star*.

The most important revision offered is a reduction of 25 per cent in the per kilowatt-hour rate for domestic consumers, who use over 200 kilowatt hours a month. This rate includes power used for cooking as well as lighting.

The rate formerly was 2 cents for every kilowatt hour in excess of 150 hours. Under the proposed schedule, this will be reduced to 1.5 cents for each hour in excess of 200.

Georgia

Interest on Deposits Paid

CUSTOMERS of the Georgia Power Company will receive approximately $90,000 in interest payments on deposits posted with the company at the time application was made for electric service, according to an announcement made by company officials.

In some cases, where the amount of interest is larger than the electric bill rendered during January, no money will be payable for electric service that month. Industrial and commercial as well as residential customers will receive the interest payments.

Officials said it was the first time any such general payment has been made and the interest period in some cases is as great as twenty years or more. In the past, interest to date has been paid at the request of individuals.

Indiana

Reduce Electric Rates

RATE reductions for Valparaiso electric customers of the Northern Indiana Public Service Company have been filed with the public service commission, according to an announcement by the district manager of the company. The rates filed with the commission also affect seven other communities in the Valparaiso district. It was said that 49 per cent of the customers of the company benefit by the reduction.

The rate revisions were made on the request of the chamber of commerce, the workingmen's association, and other civic groups. The reduction was offered to the city last spring dependent on a request to the company for such reduction, but the city council refused to make a request.

The Northern Indiana Public Service Company was charged with maintaining lobbies which obtain favorable legislation and delay hearings on rate reductions in a petition filed by the attorneys for the city of Chesterton in circuit court at Valparaiso on January 18th.

The bill is an answer filed to a complaint of the utility, which seeks to set aside an ordinance of the Chesterton town board authorizing condemnation of utility's power lines and construction of a municipal plant.

Petition Lower Phone Rate

UNABLE to reach a compromise agreement on a reduction of telephone rates at a conference, attorneys representing petitioners of Huntington announced that a formal petition for a reduction in rates would be mailed to the public service commission of Indiana immediately.

Representatives of the petitioners and their attorney conferred with officials of the Indiana Bell Telephone Company at which time a voluntary reduction in rates was requested. When informed by company officials that such a reduction was impossible, the petitioners decided to file the petition with the state commission.

Iowa

Gas Probe Started in Des Moines

PRELIMINARY investigation into the reasonableness of Des Moines gas rates was to begin on January 22nd, according to one of the city commissioners. An engineer of Ann Arbor was to arrive then to value the physical property of the company.

The engineer will first examine the data collected by the city engineering department and furnish the city with an estimate of the cost of a preliminary report.

This data consists of a list of the company's holdings, but does not include a value on the property, reproductions' costs, or cost of the distribution system.

The city's decision to study the fairness of gas rates in Des Moines came when petitions said to be signed by 16,000 persons were exhibited at the council chamber several months ago. The petitions asked lower gas rates. An ordinance providing for reduced rates accompanied them. The council agreed to pass the ordinance if it were presented and the petitions were filed. This has not been done.

A recommendation that the city build a municipal electric plant for street lighting was received by the Des Moines city council from the Des Moines Trades and Labor assembly.

The council took no action on the proposal other than to receive and file it.

Kentucky

Street Car Suit Filed

UNABLE to raise funds to meet interest payments due February 1st and to pay interest charges and bonds maturing March 1st, the Kentucky Traction & Terminal Company of Lexington, paralyzed by a strike which went into effect recently, on January 15th went into receivership. The action does not affect the Kentucky Coach Company, affiliated with the traction company.

An intervening petition asking Federal

Judge Cochran to order the receiver for the Kentucky Traction and Terminal Company to resume operation of street car service or to provide an adequate substitute was filed on January 17th by the city of Lexington, through its attorney.

The mayor of Lexington asked for an immediate temporary order to restore service if the court did not deem it proper to issue a permanent order at the present time. The petition stated that unless public transportation service "be promptly resumed, or some adequate substitute therefor be promptly provided, in an adequate, continuous, and permanent manner, this intervener, city of Lexington, and all its property holders and taxpayers and its citizens generally, but especially those citizens dependent directly upon street car service for their own transportation—being those in main who are least able to suffer loss—will suffer great and irreparable injury, loss, and damage."

The strikers, except for a small group at Frankfort, on the fifth day of the strike remained firm in their stand not to return to work until their demands that wage and hour differences being referred to the National Labor Board are granted.

Louisiana

Gas Rate Cut Restrained

UNITED States Judge Borah of New Orleans has signed an order restraining the Louisiana Public Service Commission from forcing the People's Gas and Fuel Company to reduce gas rates at Choudrant, Farmerville, Gibsland, Simsboro, and Downsville.

The judge directed members of the public service commission and Attorney General Gaston L. Porterie to appear before a special 3-judge Federal court in New Orleans to show cause why the state officials should not be enjoined from forcing establishment of the lower rates.

The People's Company contends that the lower rates will force the company to operate at a loss and that the public service commission's order, if carried into effect, will be confiscatory and violative of the Federal Constitution.

Maryland

Commission Limits Taxicabs

THE public service commission is attempting to limit the number of taxicabs on Baltimore streets, Harold E. West, chairman of the commission, has announced. Mr. West asserted that the law requires the commission to keep taxicabs within a figure compatible with public welfare and convenience.

Acting on complaints filed by the receivers of the United Railways & Electric Company the commission has suspended 142 permits for the operation of taxis. One permit was revoked. The suspensions are for periods of time varying from five days to two months. Seventy-nine taxicab owners were involved.

In almost every instance it was charged that the taxicab drivers, in violation of the commission rules, solicited riders along established routes of the United Railways and loaded up their vehicles, charging 10 cents for each passenger instead of the rates filed with the commission.

Mr. West denied charges of taxi owners who have been barred from the streets that the commission has shown partiality in its decisions. The chief engineer for the commission also denied the charges, and said the records of the cab firms who had been denied permits warranted the commission's actions.

Massachusetts

Reduces Gas Rates

A REDUCTION in gas rates which will affect from 3,000 to 3,500 consumers was announced on January 12th by the president of the New Bedford Gas and Edison Light Company.

The rates scheduled to go into effect February 1st have been filed with the Massachusetts Department of Public Utilities and

final approval is expected soon by the company.

Customers who will be affected by the reduction fall into two classes. They are domestic consumers who use the company's service exclusively for water heating in automatic type gas water heaters throughout the year, and consumers where a space-heating service is the principal heating apparatus in homes, offices, and commercial institutions.

The new rate will be available in New Bedford, Dartmouth, and parts of Acushnet. In Fairhaven, Freetown, and parts of Mattapoisett, basic charges for gas will remain as in the past, slightly higher than in New Bedford.

Minnesota

No Franchise Choice at Polls

VOTERS of St. Paul cannot choose at the primary election, March 6th, between municipal ownership and franchises extending private ownership in that city, it became known when the commissioner of public utilities announced that it was too late to submit ordinances which he had introduced granting 20-year franchises to the Northern States Power Company to the voters of the city of St. Paul.

The city commissioner explained, however, that in any event, even should the people approve the mayor's municipal ownership plan, "some contractual arrangement with the Northern States Power Company must be maintained" and that the franchises will probably be submitted at the general election, April 24th.

The St. Paul *News* announced this development may prevent a definite poll of St. Paul's populace on the question of which is preferable, municipal ownership in the form of the mayor's proposed $10,230,000 municipal electric plant or private ownership as exemplified by continuance of the Northern States Power Company franchises.

Michigan

Protest Municipal Plant

THE effort of the small city of Allegan to secure for itself a municipally owned electric light and water pumping plant is to be fought out all over again before the Federal Public Works Administration.

Sometime ago the city obtained an allotment of $410,000 from PWA for completion of the plant, upon which it already has spent $250,000 but with the stipulation that the voters must approve a bond issue as security for the loan. The election was held January 4th and the bond issue was approved by a vote of 8 to 1. Senator Couzens sent a telegram to the mayor of Allegan, preceding the election, in which he urged the adoption of the municipal plan.

Now the Senator has been notified that the Consumers' Power Company has filed a protest against the proposed loan and a hearing has been set before Public Works Administrator Ickes. Senator Couzens has indicated that he will do everything in his power to bring about approval of the loan, according to the Detroit *News*.

Mississippi

Propose Utilities Commission

CREATION of a state utilities commission which would strictly regulate all utilities operating within the state, was introduced in the Mississippi senate on January 9th by Senator Roberts, along with a companion bill to give the commission complete power over issuance of utility bonds and other securities. The bill was introduced during one of the shortest sessions on record—fourteen minutes.

Senator Roberts' utilities bill, similar to one introduced at the last session, and which has the approval of the Legislative Reform Board, would abolish the present state railroad commission, and set up the new utilities board of three members appointed from the state at large by the governor with consent of the senate. The new commission would have authority to regulate rates, permit expansions, reduce rates, and otherwise regulate utilities, even to governing their financing.

Missouri

House Defeats Utility Plan

HOPE of placing Governor Park's public works program on ballots in the form of an amendment to the state Constitution faded when the house of representatives voted down the Bennett resolution for submission of these proposals.

The resolution received 70 votes, or 6 short of the necessary majority for passage. Only 7 votes were cast against it. There were many absentees among members who apparently "ran out" on the roll call.

The proposed amendment would have given constitutional authority to cities of less than 75,000 population to float bonds, by a four-sevenths majority vote for the construction of municipally owned utility plants, the indebtedness to be retired out of the earnings of the property.

Launching a move for a United States senatorial investigation of the public utility lobby of the state legislature at Jefferson City, Colonel Hugh Miller, state engineer for the public works administration, dispatched to Vice President Garner a telegram asking him to call the activity of lobbyists to the attention of the appropriate senate committee. Colonel Miller recently assailed the utility lobbyists for their opposition to Governor Park's municipal utility bills.

Water Rate Cut Compromise

WATER consumers in St. Louis county municipalities will receive a 12 to 15 per cent reduction in water bills following a compromise agreement reached on January 16th at a meeting of St. Louis County Water Company officials and representatives of the St. Louis County League of Municipalities.

The agreement which was consummated following a series of three meetings between water company officials and municipality representatives, awaits final approval of the entire membership of the league of municipalities, before a new rate schedule will be announced by the state public service commission.

Nebraska

Compromise Reached in Water Dispute

WHAT threatened to be a bitter dispute between sponsors of Nebraska's two largest power and irrigation districts over distribution of Platte river water appears to have been dissolved by compromises reached at a series of conferences at the capitol.

The conferences took the place of a scheduled hearing before the state engineer in which the Platte valley public power and irrigation district, sponsoring the Sutherland project, asked water for development of its plants under an already approved $7,500,000 Federal PWA allotment. At the same time it had asked cancellation of prior filings for the Tri-county project, for which the Central Nebraska public power and irrigation district now is asking $44,000,000 of the government.

There were two chief features of the agreement. One was a plan to withdraw all filings of the two districts and make new filings so neither would have priority. The other was in case both water applications are granted and there is insufficient flow in the Platte river for their full appropriations for storage to pro rate them.

New Jersey

Seeks Rate Investigation

A RESOLUTION to call upon the board of public utility commissioners to investigate utility rates in the state of New Jersey and fix them at a fair level is before the state legislature again, having been introduced by Assemblyman Blank, Republican.

Mr. Blank also sponsored a measure to provide for popular election of the three utility commissioners for 6-year terms. The first election would take place after January 1, 1935, and the present salary of $12,000 a year would be retained.

New York

Lehman Offers Utility Reform Program

GOVERNOR Herbert H. Lehman sent to the legislature on January 22nd his program of public utility regulation bills, the most important of which have been turned down at previous sessions but which appear to have good prospects of passing this year because of the Republican party fight on the utility issue precipitated by State Chairman W. Kingsland Macy.

Notable among the governor's proposals is a new specification in his bill empowering the public service commission to put temporary rate cuts into effect promptly, pending a final determination of rates to be allowed. This provides that rates may be temporarily fixed at a point which gives the company a return of 5 per cent on the original cost of its plant, less accrued depreciation. Before the depression the companies insisted that rates should be based on replacement rather than on original cost; but lately have been swinging to the latter basis. On the other hand, the rate fixed is a reduction from the 8 per cent which the courts used to allow and the 6 per cent which has been allowed recently by the public service commission.

Other leading measures among the governor's eleven bills are the bills permitting municipalities to construct and operate their own gas and electric systems, and to sell the products under some circumstances outside their territorial limits, and the bill authorizing the public service commission to charge investigation expenses against companies investigated.

In addition to the bills proposed by the governor in his annual message, the message of January 22nd to the legislature included bills authorizing the commission to require contracts to be let to the lowest responsible bidder after advertisement, permitting village electric plants to sell power outside village limits, and requiring utilities to pay unclaimed deposits into the state treasury after fifteen years.

Radio Taxi Ban Lifted

RADIOS will be permitted in New York taxicabs, Police Commissioner John F. O'Ryan has ruled, thereby reversing the ruling by former Commissioner James S. Bolan on December 13th, eighteen days before he was displaced by Mr. O'Ryan.

The decision came after fifteen days of study by Commissioner O'Ryan and other men in the police department on three basic points of controversy: (1) Did radios distract drivers sufficiently to cause street accidents? (2) Were radios offensive to passengers and to persons residing in the quieter sections of New York? (3) Would the permanent removal of radios cause taxicab companies heavy losses for the equipment and in patronage?

Ask Light Rate Cut

THE New Rochelle city council has adopted a resolution unanimously calling upon the public service commission and the state legislature for a reduction in electric lighting rates. The council asks a reduction of from 6½ to 4 cents per kilowatt hour for domestic consumption, and proportionate cuts in the cost of commercial and municipal electricity. The proposed charge was called "reasonable."

It was pointed out that the council had asked the commission for a similar reduction last July without receiving any action. A city councilman said the public service commission might as well be abolished if it did nothing to protect the consumer.

North Carolina

Municipal Utilities Report

THE long and bitterly controverted question, the advantage or disadvantage of municipal utility ownership and operation, is in course of being answered by the state utilities commission.

For the first time, municipal utilities are required this year to make annual reports along with the privately owned utilities. The 1933 legislature specified that they give the same information required of private utilities, and report forms sent out to them provide for that.

The commission had ordered all utilities—there are 350 electric, gas, telephone, railroad, highway carrier enterprises in the state from which annual reports are required—to file their statements by February 1st.

The municipal reports require information on the tax rate of the subdivisions operating them as well as the balance sheets on opera-

tions, this information being regarded as essential in view of charges made that municipal plants might supply low cost service through deriving part of its support from taxes.

Ohio

Cleveland Asks Gas Cut

THE controversy over rates between Cleveland and the East Ohio Gas Company, which also serves Youngstown, is before the state utilities commission in a brief filed by Cleveland officials upholding a city ordinance to reduce the rate from 65 to 55 cents a thousand.

Cleveland's brief said the ordinance was passed "in a spirit of liberality" toward the company, and that the rate actually should not be more than 51 cents. The East Ohio, in a brief submitted at the same time, contended the rate should be 72 cents.

The company's brief fixed the rate base valuation of the East Ohio at $31,827,297 and of the Hope Natural Gas Company of West Virginia at $17,431,807. The East Ohio buys a large part of the gas distributed in Cleveland and Youngstown from the Hope Company, and both companies are owned by the Standard Oil Company.

The company contended that the commission should allow a going concern value of $3,000,000 on the East Ohio distributing system and $475,833 on the Hope producing units.

The city said that a fair valuation of the utility properties for rate-making purposes was $21,260,294 for the East Ohio and $11,743,480 for the Hope and that no allowance should be made for going concern value.

Oklahoma

Municipal Plant Defeated

IN one of the lightest votes in years, Norman taxpayers defeated the proposal for a $360,000 bond issue for a municipal light and power plant. The vote was 574 against the issue, and 320 for it in the 11 precincts of the city. Financing of the project would have been aided by a public works administration grant.

It was proposed to build a new power house and to take over the distribution lines now operated by the Oklahoma Gas & Electric Company under franchise from the city. The plans called for $126,000 of the amount to come as a Federal grant.

Oregon

Budget Censorship Test

OREGON'S utility budget censorship law, the first statute of its kind in the United States, and the basis of orders for sharp salary reductions for upper bracket officials of utilities operating in Oregon, will receive a test of constitutionality in San Francisco Federal court.

The 1933 statute, which clothes the Oregon Public Utilities Commissioner with power to reject in any rate valuation proceedings "imprudent and unwise expenditures or payments by utilities, has been invoked against the Pacific Telephone & Telegraph Company, the California-Oregon Power Company, the Mountain States Power Company, and the several other utilities operating in Oregon.

Commissioner Charles M. Thomas, who was only twenty-two years old when he was elected prosecuting attorney for Jackson county, Iowa, and who until his appointment to the commission three years ago, was circuit judge of Southern Oregon, has ordered salary reductions in some instances amounting to more than 50 per cent. He also ordered canceled payments by the utilities to service and holding companies in Eastern states.

Thomas further recommended that salaries of San Francisco and Seattle officials of the telephone company be slashed drastically, a necessary move, he said, in computing Oregon's reduction of its share of the salaries paid these officials.

Pennsylvania

Rate Schedule Comes before Supreme Court

THE new Philadelphia Electric Company rate schedule, and the old argument whether it is an increase or decrease in electricity prices, came before the state supreme court on January 16th. It became a test of strength between the electric company and the Pennsylvania Public Service Commission.

Last year the public service commission received complaints that the decrease in rates announced by the Philadelphia Electric Company was really an increase. Accordingly it issued an order compelling the company to prove that its rates were justified. The company protested that the burden of proof should be placed on the consumers, that the plaintiffs should be made to prove that the rates for electric service were not justified.

The company went to the Dauphin county court, seeking an injunction reversing the commission's order. The court ruled it had no jurisdiction and the appeal was made to the supreme court. The attorney for the electric company told the court the new schedule would cause the company to lose $805,000 a year in retail rates. In some instances, he admitted, the schedule would raise the bills of individuals.

A representative of the public service commission said that in twenty-one years of commission history, no company had previously asked an injunction against it. There is no precedent for the company's action, he said.

Also represented was City Controller S. Davis Wilson and the group of consumers who filed the original protest against the electric company's rates.

South Carolina

Commission Asks Rehearing

THE state railroad commission has asked the supreme court for a rehearing of the legal issues of the Broad River Power Company rate reduction case or for an order staying the final judgment of the court until final settlement of the case is made.

The new petition, brought in the case whereby the railroad commission seeks to bring about a 25 per cent reduction in the rates charged by the company to customers in Columbia and vicinity, was filed with the supreme court December 28th but was brought into the light on January 12th for the first time.

When the commission sought a writ of mandamus to force the power company to put into operation the new rate schedule, the court held that the commission should have taken into consideration the street car property of the company and its losses in fixing electric power rates. The court directed the commission to include the street car property and it is upon this ruling that the petition was filed.

Tennessee

Electric Rates Are Approved; To Study Phone Rates

IT was announced in Nashville that the Tennessee Electric Power Company's reduced rates on residential lighting, as contracted with the Tennessee Valley Authority, have been approved by the state railroad and public utilities commission, effective as of January 5th, and to be reflected in all bills of February 1st or thereafter.

Reserving its legal rights to make revisions, if necessary, the commission gave its approval to the entire contract between the Tennessee Valley Association and the Commonwealth & Southern Corporation, the holding company of the Tennessee, Georgia, Alabama, and Mississippi power companies affected.

With a view to slashing electric rates in a large section of West Tennessee, a few localities in Middle Tennessee and others in the Bristol-Kingsport-Johnson City vicinity in the eastern division, the Tennessee Railroad and Public Utilities Commission has started a study of records of utilities serving the affected localities.

When Knoxville, Chattanooga, Nashville, and Memphis municipal officials give the signal, the state public utilities commission will take up the request made last July for a reduction in telephone rates.

The Latest Utility Rulings

State Rate Making Sustained on Historic Harpers Ferry Toll Bridge

It was back in 1822 that the general assembly of Maryland passed an act (Laws 1821, Chap. 119) providing that in case the commonwealth of Virginia authorized Catharine Wager and James Wager to erect a bridge across the Potomac river at a point since known as Harpers Ferry, then it should be lawful for the bridge to be abutted on the Maryland shore and for the owners of the bridge to charge such tolls for passage thereof as the legislature of Virginia should authorize. Later the same year the Virginia assembly passed a law permitting the Wagers to erect the toll bridge and to charge the followings tolls:

> "For every foot passenger, six and one-fourth cents; for every horse, mule, or work-ox, six and one-fourth cents; for all riding carriages, wagons, carts, and drays, six and one-fourth cents per wheel; for every head of neat cattle, three cents; for every score of sheep, hogs, goats, or lambs, twenty cents; and so in proportion for a less number."

Pursuant to these two state acts, the bridge was built and has since been operated by various successors in title to the Wagers but a number of changes have occurred otherwise. That portion of the former Virginia shore upon which one end of the bridge and toll house is situated is now part of the state of West Virginia, and the character of traffic is almost exclusively motorists operating between the states of Maryland and West Virginia. Recently, the West Virginia Public Service Commission took steps to revise the quaint old rate schedule under which the toll bridge has been operated since it was built. The present owners—the Harpers Ferry & Potomac Bridge Company—resisted this attempt and the commission brought a proceeding in the West Virginia courts for a writ of mandamus to compel the company to file with the commission the schedule of tolls charged traffic crossing the bridge. The bridge company contended (1) that the bridge is an instrumentality of interstate commerce not subject to state supervision; (2) that the commission has no statutory jurisdiction over toll bridges; (3) that the original acts of two states of Virginia and Maryland setting up the old rate schedule constituted a contract between the two states and the Wagers and their assigns, the obligation of which neither state can constitutionally impair; (4) and that the right of the Wagers and their assigns is a property right of which they cannot be constitutionally deprived.

On the first point the supreme court of appeals of West Virginia decided that in the absence of Federal regulation, the states could lawfully regulate forms of interstate commerce which are of local importance only. On the second proposition, the court held that the present public service commission of West Virginia is today the duly authorized inheritor of the regulatory powers originally possessed by the Virginia legislature over such toll bridges in the territory now known as West Virginia. On the third point the court held that permissive acts of adjoining states authorizing the construction of a toll bridge and including a list of tolls is not a contract between the states and the operator of a bridge subsequently built pursuant to such legislation which would preclude the states from thereafter regulating tolls.

Likewise, on the fourth point the court held that neither the contract clause nor the due process clause of

the Federal and state Constitutions can have the effect of sustaining the police power of the state to make reasonable measures to secure the health, safety, good order, comfort, or general welfare of its inhabitants. *Public Service Commission v. Harpers Ferry & Potomac Bridge Co.* (*No. 7691; 171 S. E. 760.*)

City's Move to Acquire Utilities Results in Rate Cut

An interesting development growing out of an attempt by the city of Yuma, Ariz., to acquire its own electric and gas utility properties occurred when by reason of the intervention of the Arizona commission the movement resulted in a reduction of the electric rates of the privately owned company operating in Yuma and a suspension of the city's request for a right to operate its own utilities.

The case originated in a formal application by the city council of Yuma to the Arizona Corporation Commission for a certificate of convenience and necessity that would authorize the city to own and operate the electric, water, and gas utilities for service to consumers generally in Yuma. The city council's resolution cited that it was the intent of the city to acquire such utilities "either by a purchase of the present public utility plant or plants owned by the Arizona Edison Company and/or its receiver, at a reasonable, just, and fair valuation to be determined upon by competent engineers and this commission, or in lieu thereof to purchase, install, and operate its own municipally owned public utility plant." Upon receiving this application, the state commission, however, intervened in the case on its own motion and broadened the issues to include an investigation as to the reasonableness of the rates and practices of the private company now serving the city with gas, electricity, and water.

The reason for this act of the commission was explained in the opinion. It appears that a recent enactment of the state legislature placed upon municipal utility plants practically all of the restrictions which had previously been imposed upon private utility operations. Among these restrictions was a provision that no one should engage in the construction and operation of a utility plant without first securing from the commission a certificate of public convenience and necessity. The commission construed this law to mean that a showing of public convenience and necessity was required to support an application for new utility operations whether filed by a municipality or a private applicant. On this point the commission stated:

> "Under these circumstances, we believe it is the intent of the statutes from which we derive our jurisdiction to act, that applicant must show, in support of its application, first, that the rates are excessive *per se;* second, that the rates are maintained by respondent in excessive amounts by reason of causes or conditions which the commission is without authority to correct, or which respondent is unable or unwilling to correct on its own account. It was this viewpoint which prompted us to intervene in the case, to the end that if the investigation of the issues presented by applicant, and those made subject to investigation through the intervention of the commission, resulted in the showing that the rates charged by respondent are in fact excessive, and if excessive rates are found to be caused by conditions which the commission is empowered to correct, a corrective order directed against respondent may be entered immediately. On the other hand, assuming that the rates are found to be excessive or service impaired or both, due to causes beyond the control of the commission, but which might be eliminated through authorizing the applicant to enter the field under circumstances whereby the adverse conditions would not exist to the detriment of consumers, it will manifestly be our duty to grant the application. In the latter case, the showing must be conclusive, since the granting of a certificate is of far-reaching effect.
>
> "Among the many reasons which might exist for excessive rates, the one which most frequently suggests itself to the consumer is that of excessive net earnings.

> However, there are many other reasons equally controlling, among which might be suggested a lack of ability to finance essential equipment or facilities, or to finance the replacement of equipment which has become entirely unadapted to the uses to which it is put, involvement of the utility in injudicious contractual relationships with others, uneconomic partition of the operating territory; or the utility may be organized so as to operate with an excessive overhead which may be unavoidable in its case, but which could be avoided by a new entrant into the field. A showing that the physical plant is old in part is not sufficient, assuming that the property as a whole has been properly maintained; since any plant, regardless of ownership, must age, and shorter-lived equipment be replaced before other property has reached the end of its useful life, leading to a sort of equilibrium with respect to composite age."

After allowing 3½ per cent of the depreciable property of the electric department and of the water department, respectively, and 4 per cent of the depreciable value of the gas department for annual depreciation, the commission found that the electric rates alone were subject to modification. It ordered a reduction in an amount calculated to yield a return of approximately 6 per cent. It found that the gas department was not a paying institution and that no adjustment of gas rates would be of any service. Only a minor change was made in the schedule for water service, in order to encourage the use of more water and to justify a slight decrease in the rate. The commission concluded:

> "With respect to the other issue before us, namely that of the application of the city of Yuma for a certificate of convenience and necessity to install and operate its own electric, water, and gas plants, we may say that the record is not without proof that respondent is committed to operating under the handicap of poorly adapted plants and an unwieldy organizational structure. However, since the entire proceeding shaped itself more along lines of an investigation of rates we would prefer to reserve judgment in the matter of the city's application for a certificate of convenience and necessity at least until the results of the rates established by us herein have been tried for a reasonable period."

Re City of Yuma et al. (*Docket No. 4926–E–438, Decision No. 7031.*)

Ohio Commission Settles Nine-year Old Phone Rate Dispute

In a majority opinion, written by Commissioners Frank Geiger and Charles F. Schaber, the Ohio commission has ordered a substantial reduction in the rates of the Ohio Bell Telephone Company in a case which has been pending since June 30, 1925. The commission also ordered the company to repay to customers $13,289,172, as excessive profits from 1925 to 1932, inclusive; and found that no excessive profit was earned during the year 1933.

Disallowing claimed depreciation expense of $16,789,697, and license contract costs with the Western Electric Company and American Telephone and Telegraph Company of $2,983,926, the commission placed the value of the interstate property at $126,250,206 for 1933 and at $93,707,488 as of June 30, 1925. The reduced schedule of rates ordered into effect for 1934 was calculated to allow a return of approximately 5.5 per cent. The commission will permit the company to make an application for increased rates if the reduced rates fail to realize such a return.

The commission found that a fair return during the years from 1925 through 1929 was 7 per cent, and during the years 1930 to 1931 a fair return was fixed at 6.5 per cent, while 5.5 per cent was held to have been sufficient for 1932 through 1933. This would mean an average of 6.5 per cent, as against an actual average earned of 7.71 per cent for the nine years in question.

Should the courts sustain the commission's ruling the patrons of 46 of the company's 163 exchanges would re-

ceive refunds, though the commission did not state how this amount should be allocated. No attempt was made to establish definite rates for the operating companies. Since 1925 the Ohio Bell has collected under advanced rates $31,311,553, including interest of $6,331,411. These advances have been made under bond which is more than sufficient to cover the $13,289,172 refund ordered by the recent commission opinion.

The commission's ruling in regard to licenses and royalties paid by the Ohio Company to the American Telephone and Telegraph Company and its subsidiaries, the Western Electric Company, was contrary to findings of a 3-judge Federal court in the recent Illinois Bell Telephone Case in which the court upheld the license contract in that state. The Ohio commission stated:

> "As to the rental of instruments, we are not in harmony with the—Illinois—court as to the cost of this service to the American Company especially on the item of 7 per cent depreciation in Ohio. It appears from the evidence that the American Company charged the licensees 7 per cent depreciation as part of the cost of its service, but when it sold the instruments to the licensees such depreciated value was disregarded and a profit of $14,395,800 was realized on all such instruments so sold."

While conceding its own lack of responsibility or jurisdiction to control prices charged by the Western Electric Company for royalties and licenses, the commission stated that the Ohio Bell Company should be penalized for paying such prices, inasmuch as the profits of these companies flow into the same treasuries through the common holding company.

Chairman Edward J. Hopple, in a dissenting opinion, branded the majority findings as confiscatory, and cited disregard of $160,000,000 in improvements made since June 30, 1925. *Re Ohio Bell Telephone Co.*

Enforcement of New York City Power Rate Cut Suspended

SHARP criticism of the attempt by the New York commission to reduce light rates in New York city area on the ground that the commission had attempted to use methods "not sanctioned by law" was contained in a decision handed down on January 16th by Supreme Court Justice Gilbert V. Schenck.

The five companies serving New York city consumers obtained a stay of the commission's rate reduction order pending determination by the appellate division of the certiorari proceedings brought last December by the companies.

Justice Schenck declared in his decision that the methods used by the commission were "prejudicial to the companies." The formula used in adopting the lower rates was sanctioned neither by statute nor judicial decision, the judge said. He conceded the possibility that the petitioning companies may have accumulated a very large surplus, but pointed out that the law does not require utilities to give up, for the benefit of future consumers, any part of accumulations from past operations. Enforcement of the order would have cut the revenues of the companies involved by about $9,000,000 a year, it has been stated.

The court ordered the companies to file a bond for the protection of the consumers in the event that the commission's rates are ultimately upheld by the appellate division. *New York Edison Co. et al. v. New York Public Service Commission.*

Enforcement of Minneapolis Gas Rate Cut Restrained by Federal Decree

THE city ordinance providing for a 19.4 per cent reduction in the rates of the Minneapolis Gas Light Company was enjoined temporarily in a decision handed down in Federal district court on January 15th. The decision prevents the city from taking steps to put the ordinance into effect until a trial on an order for a permanent injunction can be had. It also provides for the protection of users of gas by ordering the gas company to file a bond for reimbursement for overcharges in case the final action by the courts upholds the ordinance.

Failure of the city to show any definite figure as to the valuation of the company's property for rate-making purposes was the principal reason assigned by the court for suspending the ordinance. The court stated:

> "It is fair to assume from the showing before this court and from transcripts of proceedings before the city council that the arbitrary figure of 19.4 per cent was arrived at as a trading figure with expectation that some reduction less drastic would be agreed on between parties and accepted by the city council."

Attention was called to the fact that a few days before the ordinance was passed, the council gas committee voted to recommend a reduction of only 12.5 per cent, but the higher figure prevailed in the final passage of the ordinance following refusal of the company to negotiate to the satisfaction of the city council. The court said it could not restrict its consideration either to the historical cost plus price indices basis suggested by the city or to the reproduction cost estimate basis suggested by the company. Both theories, however, were said to suggest a reasonable middle ground for serious consideration. The court added that the fact that the company earned more than a reasonable return in the last three years cannot be taken into consideration in determining a rate for the future.

The court took judicial notice of the fact that the government has dedicated itself to a raise in prices and that present estimates on utility revenue based on present prices are "bound" to need revision in the future. The court admitted the possibility of abuse in certain intercorporate transactions between the utility and its parent concern, but preferred to leave such matters for the hearing on the permanent injunction. *Re Minneapolis Gas Light Co.*

Gas Service Charge Is Approved by Department

THE Massachusetts Department of Public Utilities has approved gas service charges in a report to the legislature. The department investigated these charges at the request of the senate, which called on the department to "investigate the feasibility and expediency of doing away with service charges and establishing different or alternative rate structures to adjust the relative payments by domestic users according to the service rendered."

"Persons of small means in the areas supplied by the Consolidated Gas Company," said the department, "are generally those who have a home life and substantial families, and where a large amount of cooking is done, and the use of hot water is substantial. We believe that a prohibition of the service charge will have little or no tendency to relieve the burdens of those of limited means, but on the other hand will tend to increase them." *Re Service Charges of Gas & Electric Companies* (*D. P. U. 4693.*)

NOTE—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS, AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

VOLUME 1 P.U.R.(N.S.) NUMBER 4

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Camera study by Robert Dudley Smith

The Electric Rails